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John Moeller

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TABLE OF CONTENTS

ARTICLES

ENVIRONMENTAL LITIGATION: PREVAILING VALUES OVER ENDURING PRINCIPLES? ..... *John Moeller* 769

CORPORATE FREE SPEECH AND CAMPAIGN FINANCE IN MISSISSIPPI ..... *Michael B. Wallace and Kenneth G. Stamps* 819

PROTECTED CONCERTED ACTIVITY IN THE NON-UNION CONTEXT: LIMITATIONS ON THE EMPLOYER'S RIGHTS TO DISCIPLINE OR DISCHARGE EMPLOYEES ..... *Judith J. Johnson* 839

COMMENTS

IN SEARCH OF A HABITABLE HOME IN MISSISSIPPI 881

FEDERAL TAXATION OF POLITICAL CAMPAIGN ORGANIZATIONS 911

RECENT DECISIONS

FEDERAL JURISDICTION — ABSTENTION — JUDICIAL ECONOMY AS A GROUND FOR FEDERAL ABSTENTION (*Will v. Calvert Fire Insurance Co.*, U.S. 1978) 951

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — FOURTH AMENDMENT REQUIRES VERACITY HEARING AT DEFENDANT'S REQUEST TO CHALLENGE FACTS UNDERLYING FACIALLY SUFFICIENT AFFIDAVIT (*Franks v. Delaware*, U.S. 1978) 962

FEDERAL JURISDICTION — CLASS ACTIONS — ORDERS RELATING TO CLASS CERTIFICATIONS NOT APPEALABLE UNDER 28 U.S.C. § 1291 PRIOR TO FINAL JUDGMENT (*Coopers & Lybrand v. Livesay*, U.S. 1978) 973

JURY INSTRUCTIONS — REASONABLE DOUBT — "DON'T HAVE TO KNOW" INSTRUCTION IS NOT REVERSIBLE ERROR WHEN CONVICTION IS BASED ON DIRECT EVIDENCE (*Bell v. State*, Miss. 1978) 985

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ENVIRONMENTAL LITIGATION: PREVAILING VALUES OVER ENDURING PRINCIPLES?

*John Moeller**

Regardless of whether government in the United States is by the judiciary, it is manifest that many matters once settled by legislators or executives are now resolved by courts. Although the intellectual progenitor of this movement toward the judiciary might be that famous footnote in *United States v. Carolene Products Co.*,[1] public law litigation matured during the Warren Court years. Discrete and insular minorities such as blacks, malapportioned voters and incarcerated criminals who had little, if any, access to the political process, asked the Supreme Court to guarantee and protect their personal rights. Because the Court invariably affirmed those requests, the same minorities pressed for additional rights while other persons and groups, neither discrete, insular nor in the minority, petitioned the Court to resolve political deadlocks in their favor.[2]

For both practical and ideological reasons, environmentalists have been especially active in trying to persuade state and federal courts to adjudicate seemingly political questions.[3] Environmental handbooks and law review articles explain the specifics of litigation and the strate-

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[1] 304 U.S. 144, 152 n.4 (1937). The Court recognized a presumption of constitutionality of legislation affecting ordinary commercial transactions, *id.* at 152, but further indicated that a narrower scope for operation of such a presumption may be called for when "legislation appears on its face to be within a specific prohibition of the Constitution." *Id.* at 152 n.4. In addition, the Court specifically reserved the issue of whether a more exacting judicial scrutiny is required when the legislation under attack is restrictive of those political processes that may be expected to protect "discrete and insular minorities." *Id.*

[2] Brian Weber and Allan Bakke are the most recent examples of this increasingly judicially active "majority." *See* United Steelworkers v. Weber, 99 S. Ct. 2721 (1979) (Title VII does not prohibit privately bargained for affirmative action programs); Regents of the Univ. of California v. Bakke, 98 S. Ct. 2733 (1978) (Title VI does not proscribe using race as a factor in a university's special admissions program).

[3] As explained by one commentator: "In fact, the federal court system as a whole may be the best suited American governmental institution to undertake the ideological task of extricating society from its whole-hearted embrace of economics, law and politics which are no longer fitted to environmental realities." Ragsdale, *Ecology and the Rule of the Federal Courts,* 46 U. Mo. K.C.L. Rev. 221, 236 (1977).

gies for obtaining standing and winning cases,[4] and a look at any federal court docket persuades that the books and articles are being read. During the 1977 Term, the Supreme Court of the United States was asked to decide whether the Vermont Yankee Nuclear Power Station should be licensed to operate a specific nuclear reactor.[5] And in a highly celebrated and satirized controversy, those nine wise men were asked to choose between the completion of a dam and the continued existence of the snail darter, a three-inch fish that lives only where the dam was being built.[6]

But the cardinal conflict here is not between dams and snail darters; it is between prevailing values and enduring principles. This is not an either-or dilemma, and the skeptic who proclaims that view misunderstands politics and undervalues the constitutional structure. He knows that battles can be won by picking the right judge to hear a case, but he has yet to learn that final victory depends upon searing the conscience of the people.

I. The New Public Law Litigation

Abram Chayes proffers a concise explanation of public law litigation.[7] Traditionally, he argues, courts existed to resolve conflicts between two parties, but liberalized rules of standing and class actions have contributed to the demise of that "bipolar structure."[8] Today, groups seek relief in courts. The new litigants are black school children, poor persons living in the same school district with more wealthy ones, and state welfare recipients, among others.

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[4] *See, e.g.*, J. Arbuckle, Environmental Law Handbook (4th ed. 1976); J. Jeans, Pollution Litigation (1970); W. Rosenbaum, The Politics of Environmental Concern (1973); R. Saltonstall, Jr., Your Environment and What You Can Do About It (1970); Coggins, *Some Suggestions for Future Plaintiffs on Extending the Scope of the National Environmental Policy Act*, 24 Kan. L. Rev. 307 (1975).

[5] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[6] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 156 (1978) (Court held in favor of the snail darter on the basis of the Endangered Species Act of 1973, requiring the saving of endangered species at all costs). That the satire did not depend on one's politics is obvious from the following representative comments. "The bad news is that the environmentalists have won the Tellico Dam battle. The good news is that the Supreme Court managed to save the snail darter without recourse to the Fourteenth Amendment." National Review, July 7, 1978, at 813. "It took the highest court in the land to save the nation's tiniest fish, giving the news media a whale of a story and threatening to leave the Tennessee Valley Authority's $120 million Tellico Dam project high and dry." New Republic, July 1, 1978, at 5.

[7] Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976).

[8] *Id.* at 1289-91.

The frequent and extensive use of equity is a second characteristic of the new public law model.[9] The traditional judicial decision comprised a winner and a loser, and only in special instances when the applied law was inadequate or patently unfair did judges resort to equity. Courts now routinely avoid winner-take-all decisions, emphasizing instead what is fair or appropriate.[10] If that approach requires the overseeing of a conflict long after the immediate issues have been decided, then, according to the courts, so be it. In the environmental litigation discussed below there is not one example of a judge's having awarded damages, but there are many instances where judges have enjoined agency action and have carefully dictated what prospective action must be taken for the injunction to be lifted.

Third, Chayes explains, the factfinding process has changed dramatically.[11] According to the traditional adversary theory, the parties present facts as persuasively as possible in front of a passive judge and jury. In the new litigation the facts of the conflict take a back seat to competing social theories and social science findings, and judges are asked to evaluate technical reports that are often couched in complex methodology. Because judicial relief frequently is remedial, the judge is then asked to evaluate a second set of predictive facts and theories.[12] In ordering crosstown public school busing, for example, the judge must foresee whether the resulting white flight will simply aggravate the existing segregation, or if racial and social conflicts will in fact deteriorate the quality of education.[13]

The essence of the new model is the decree formulated and issued by the judge.[14] Whereas judicial decrees of the past usually served only to negate some state or federal conduct, they now frequently mandate affirmative remedies and duties.[15] A comparison of *Brown v. Board of Education (Brown I)*[16] and *Swann v. Charlotte-Mecklenburg Board of Education*[17] illustrates the difference: the former prohibited segregation in public schools;[18] the latter compelled school systems to bus children between schools to enhance integration.[19] District Judge Frank John-

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[9] *Id.* at 1292.

[10] *Id.* at 1293.

[11] *Id.* at 1296.

[12] *Id.*

[13] *Id.* at n.71.

[14] *Id.* at 1288.

[15] *See* A. Cox, The Role of the Supreme Court in American Government 76-98 (1976).

[16] 347 U.S. 483 (1954).

[17] 402 U.S. 1 (1971).

[18] 347 U.S. at 495.

[19] 402 U.S. at 15-16.

son's celebrated mental hospital[20] and prison decisions[21] in the State of Alabama exemplify the new kind of decree. Ruling that inmates had been denied constitutional rights,[22] he itemized the remedies and duties imposed on the state[23] by the Constitution. The orders substantially affected the social policy of the state since shifts in the state's budget allocations were required to accomodate the orders.[24]

In addition to operating prospectively, the decrees are "deliberately fashioned rather than logically deduced from the nature of the legal harm suffered."[25] Their formulation often resembles a political decision: the opposing parties bargain, intervening parties submit plans for the proposed remedy, and the judge mediates, often with the help of experts and masters. The wise judge pondering the facts, finding the law and appropriating the remedy is an image alien to most public law litigation.

Deliberately fashioned decrees have, not surprisingly, a profound impact on society. Court-ordered busing, Archibald Cox expounds, "reorder[s] people's lives in a way that benefits some and disappoints others in order to achieve social objectives. . . . The decrees thus directly regulate the lives of millions of people without voice in the deci-

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[20] Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (class action on behalf of involuntarily confined patients at Bryce Hospital, Tuscalousa, Alabama) (*Bryce IV*); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972) (*Bryce III*); Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971) (*Bryce II*); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (*Bryce I*).

[21] Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978).

[22] *Bryce I,* 325 F. Supp. at 785 (hospital conditions in violation of due process); 406 F. Supp. at 329 (prison conditions in violation of eighth and fourteenth amendments); *cf.* Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972) (conditions in maintenance and operation of state penitentiary unconstitutional), *aff'd,* 501 F.2d 1291 (5th Cir. 1974).

[23] Among the requirements imposed by Judge Johnson in the prison case were the following: "[I]n working order one toilet per 15 inmates, one urinal or one foot of urinal trough per 15 inmates, one shower per 20 inmates, and one lavatory per 10 inmates . . . . [E]ach inmate who requires a special diet for reasons of health or religion shall be provided a diet to meet his or her individual need . . . and [v]isitors shall not be subjected to any unreasonable searches." 406 F. Supp. at 334 app.A.

In the *Bryce Hospital* cases, Judge Johnson directed the officials of the Bryce and Searcy Hospitals to implement "Minimum Constitutional Standards For Adequate Treatment of the Mentally Ill," *Bryce III,* 344 F. Supp. at 379 app.A, and the officials of the Partlow State School and Hospital to implement "Minimum Constitutional Standards For Adequate Habilitation of the Mentally Retarded," *Bryce IV,* 344 F. Supp. at 395 app.A.

[24] After Judge Johnson's decisions in the *Bryce Hospital* cases, expenditures at the hospital increased from fourteen to fifty-eight million dollars annually, forcing reduced spending in other social programs. *See* Glazer, *Should Judges Administer Social Services?,* 50 PUB. INT. 64, 71 (1978).

[25] Chayes, *supra* note 7, at 1298.

sion."[26] For good or bad, neighborhood schools had naturally evolved into prominent social, political and educational institutions in many regions of the country, and now in city after city the sleight of judicial decree is enough to transform them radically.

Hobson v. Hansen[27] nicely illustrates Chayes' musings about the current condition of public law.[28] Like previous desegregation cases, *Hobson* sought relief for a group of black school children,[29] and Judge J. Skelly Wright's[30] orders addressed group, rather than individual, interests.[31] Tracking,[32] for example, was prohibited not because it injured any particular child, but because it discriminated against all black children.[33] The decision to limit the equalization of expenditures per pupil to teachers' salaries and benefits relied on equity.[34] Indeed, the application of law would have mandated across-the-board equalization, but

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[26] A. Cox, *supra* note 15, at 87.

[27] 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); *cf.* P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972) (school district restrained from administering IQ tests to black students for placement into classes for the mentally retarded). The following discussion of *Hobson* is based upon D. Horowitz, The Court and Social Policy 106-70 (1977).

[28] "In fact, one might say that, from the perspective of the traditional model, the proceeding is recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge." Chayes, *supra* note 7, at 1302.

[29] 269 F. Supp. at 405.

[30] Judge Wright, Circuit Judge for the Court of Appeals for the District of Columbia Circuit, was sitting as a district judge in *Hobson* pursuant to 28 U.S.C. § 291(c) (1976). 269 F. Supp. at 405.

[31] Judge Wright noted: "[T]he defendants' pupil placement policies discriminate unconstitutionally against the Negro and the poor child whether tested by the principles of separate-but-equal, *de jure* or *de facto* segregation." 269 F. Supp. at 515.

[32] The "track" system held unconstitutional in *Hobson* was a method of classifying students according to their putative abilities to learn. *Id.* at 513. Judge Wright concluded, however, that since track assignments were being made on the basis of scores from standardized tests geared to the white middle class, blacks were actually being classified on the basis of their "socio-economic or racial status" rather than on their "innate ability" to learn. *Id.* at 514. Brushing aside the defendants' argument, based upon a number of cases, that courts will not interfere with classification systems based on aptitude tests, Judge Wright reasoned that "in none of [those cases] did the courts have occasion to consider whether the tests used were in fact accurate in ascertaining innate ability." *Id.* at 514 n.212. Relying heavily upon conclusions of a 1965 study made at a predominantly black penal institution, Judge Wright boldly ruled that "defendants presently lack the techniques and the facilities for ascertaining the innate learning abilities of a majority of District school children." *Id.* at 488 (relying on N. Burke & A. Simons, A Measure of the Educational Achievement of a Group of Incarcerated Culturally Disadvantaged and Educationally Deprived Dropouts (1965) (the *Lorton* Study); *see* 269 F. Supp. at 485 & n.136; D. Horowitz, *supra* note 27, at 108 (effect of plan was resegregation).

[33] *See* 269 F. Supp. at 511-14.

[34] D. Horowitz, *supra* note 27, at 122.

Judge Wright was interested in fairness as well as tactical and strategic considerations, and therefore chose the narrow measure of equality. That choice was bolstered by a social science study that suggested a positive relationship between teaching experience and student performance.[35] Although the study was inconclusive, it "imparted to the decision the veneer of extralegal legitimacy."[36]

The decree has affected the operation of the District of Columbia schools in unexpected ways. To comply with the pupil-teacher ratio, the board of education simply moves special-subjects teachers from school to school: if the ratio is too low, a special-subjects teacher is removed, if too high, one is brought in. To make matters worse, the movement is in the middle of the term, because that is when attendance figures become complete. The consequence of the movement is that the disadvantaged schools today are more severely slighted than were comparable schools prior to the equalization order. But the denouement is that Supreme Court decisions have since rejected the premises upon which *Hobson* was decided.[37] Containing a prospective decree that mandated affirmative remedies, *Hobson* suffered the defects of a judge's acting as an administrator.

Public law litigation will probably continue to expand,[38] at least partially because courts have laid down working principles such as liberalized rules of standing, broader application of the state action doctrine, and the creation of new rights that must now be developed to their logical conclusion; the busing and affirmative action decisions of the 1970s are the descendants of *Brown v. Board of Education (Brown II)*.[39] As long as the positive role of government continues to grow, so too will public law litigation. Judges Frank Johnson and Skelly Wright, for example, seem to perceive government through the courts as the protector and provider for all Americans, but especially the politically powerless ones. And finally, new litigation, often in the name of public interest, will continue to deluge the courts because the new breed of "[l]awyers strive[s] for objectives in the service of ideologies that cannot be realized through the legislature and executive functions of governments but may be through the agency of authoritarian courts."[40]

Although the growth of the public law model is scarcely debatable,

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[35] *Id.* at 136-46.

[36] *Id.* at 146.

[37] Judge Wright had in *Hobson* declared education to be a fundamental right, but the Supreme Court later rejected that premise in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1973).

[38] *See* Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. 104, 111-12 (1975).

[39] 349 U.S. 294 (1955).

[40] Glazer, *supra* note 38, at 120.

its desirability is the most controversial contemporary issue among observers of the courts. The controversy is really the continuation of a long-standing disputation about "line-drawing" by the courts.[41] The term implies a two-step process. First, any judge hearing a case must be congnizant of the courts' constitutional role. Admittedly loaded with ramifications, this first step focuses on the essential differences between judicial restraint and judicial activism, and, because it embraces the process of government, may be termed the process line. Once that line is drawn—it does not have to be redrawn with each case—the judge can turn his attention to the specific policy line.[42]

As a general rule, the farther toward activism on an imaginary continuum that a judge draws the process line, the more frequently he will face the drawing of policy lines. In *Baker v. Carr*,[43] for example, Justices Frankfurter[44] and Harlan,[45] wary of the Herculean task of drawing reapportionment policy lines, chose instead a process line near the restraint end of the continuum.[46] Having included state reapportionment within the purview of the federal judiciary,[47] however, the Su-

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[41] This term, used occasionally by the courts in their opinions, is studied systematically in H. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE 319-28 (3d ed. 1975).

[42] Church-state controversies, in which the Court distinguishes what the first amendment requires, *see, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963), from what it forbids, *see, e.g.*, McCollum v. Board of Educ., 333 U.S. 203 (1948), furnish good examples of the difficult problems involved in drawing policy lines. Of course, the line can be crooked, and even elastic. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 819-25 (1978).

[43] 369 U.S. 186 (1962) (plaintiff may state a justiciable claim for relief alleging that apportionment of state legislature violates equal protection).

[44] *Id.* at 266 (Frankfurter, J., dissenting).

[45] *Id.* at 330 (Harlan, J., dissenting).

[46] Justice Frankfurter wrote:

> [T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate.

Id. at 270 (Frankfurter, J., dissenting). In addition, Justice Harlan warned:

> The majority seems to have accepted the argument . . . that if this Court merely asserts authority in this field, Tennessee . . . will quickly respond with appropriate political action, so that this Court need not be greatly concerned about the federal courts becoming further involved in these matters. At the same time the majority has wholly failed to reckon with what the future may hold in store if this optimistic prediction is not fulfilled. Thus, what the Court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication.

Id. at 339 (Harlan, J., dissenting).

[47] The Court held in *Baker* that the subject matter of the complaint was within the jurisdiction of the federal courts under 28 U.S.C. § 1343 pursuant to U.S. CONST. art. III,

preme Court has since struggled to find a policy line that adheres to the meaning of "one-man one-vote."[48]

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§ 2, 369 U.S. at 198-204, and that the subject matter of the suit was justiciable. *Id.* at 209, 237.

[48] The Court's opinion in *Baker* was limited to matters of jurisdiction, standing, and justiciability, and did not reach the merits of the plaintiff's claim, which was based upon the fourteenth amendment equal protection clause. 369 U.S. at 237. Subsequently, in Wesberry v. Sanders, 376 U.S. 1 (1964), the Supreme Court's reversal of a district court's dismissal of a complaint alleging an equal protection violation under a Georgia statute prescribing state legislative districts was based upon U.S. CONST. art. 1, § 2, rather than upon the equal protection clause. 376 U.S. at 7-8 & n.10. Justice Clark argued that the reversal should have rested upon the equal protection clause. *Id.* at 18-20 (Clark, J., concurring in part and dissenting in part). Additionally, while the "one-man one-vote" principle was derived from Gray v. Sanders, 372 U.S. 368, 381 (1963), the *Wesberry* Court stated that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 8. In Reynolds v. Sims, 377 U.S. 533 (1964), in holding on the basis of the equal protection clause that both houses of a state's bicameral legislature must be apportioned on a population basis, *id.* at 577, the Court stated "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.

As might well have been expected after the initial breakthrough in *Baker*, the issues in later cases have become increasingly discrete and the standards have remained somewhat fuzzy. In Chapman v. Meier, 420 U.S. 1 (1975), the Court ruled, relying upon its statement in Connor v. Johnson, 402 U.S. 690 (1971) indicating a preference for single-member districts in court-ordered reapportionment plans, that the plan ordered by the district court, which included five multi-member districts, was constitutionally insufficient because there had been no showing of a "singular combination of unique factors" justifying the multi-member districts. 420 U.S. at 21; *see* Mahan v. Howell, 410 U.S. 315, 333 (1973). The Court then stated that unless such unique factors could be shown, the district court should reinstate single-member districts to attain the "necessary goal of substantial population equality." 420 U.S. at 21. Furthermore, any notion that the validity of a judicially imposed multi-member district scheme would depend on allegations of discrimination against minority groups was effectively dispelled in *Chapman*. *See id.* at 20. Finally, feeling the burden the Court had first placed upon its shoulders in *Baker*, the *Chapman* Court stated: "[T]he District Court . . . should proceed with dispatch to resolve this seemingly interminable problem." *Id.* at 27. And in perhaps the most litigated case in this area of the law, presently styled Connor v. Finch, 431 U.S. 407 (1977) (most recent opinion on the merits), the Supreme Court ruled that a plan for reapportionment ordered by a district court in Mississippi failed to meet minimal constitutional standards. Testing the plan against the *Reynolds* standard as modified in *Chapman*, that the plan "achieve the goal of population equality with little more than de minimis variation," *id.* at 420 (*citing* Chapman v. Meier, 420 U.S. 1, 26-27 (1975)), the Court held that although the plan contained no multi-member districts, its adherence to traditional county boundaries in the drawing of single-member districts violated the equal protection clause because no "unique features" of the state's politics required such districting, and the plan would have caused an impermissible maximum variation in district population of 15-20% in both houses of the legislature. 431 U.S. at 416-20. Once again, seemingly frustrated with the whole matter, the Court noted that the litigation was at that time twelve years old, that the district court should draw up an order that would not give rise to new constitutional

Environmental lawyers are in the forefront of this new public interest advocacy, and environmental litigation is a contemporary illustration of line-drawing. The remainder of this Article will ascertain where the courts have drawn environmental process and policy lines, and suggest where the lines should be drawn in the future.

II. A Constitutionally Protected Environment?

Although environmental statutes are the impetus for most environmental litigation, parties occasionally raise constitutional queries. Most prevalent is the assertion that there exists a fundamental right to a clean, healthy environment.[49] To be sure, the right is not ordained by the Constitution, but is one of the interests—race, reapportionment, and abortion are others—that is sufficiently vital to twentieth century man that the courts must direct the way when the other branches of government are reticent. According to one commentator, the courts increasingly have had "to readjust the traditional system so that the structure of society might remain viable, albeit new."[50] Indeed, the right to a clean environment, being fundamental, is too "important to be left to the vagaries of majority will."[51]

Borrowing from Justice Douglas' opinion in *Griswold v. Connecticut*,[52] others utilize a penumbra rationale, urging that the Bill of Rights is meaningful only if one is alive and healthy to enjoy the rights guaranteed in it.[53] Some suggest that a pollution-free environment and adequate natural resources are among the retained rights guaranteed by

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challenges, and that the task should "be approached not only with great care, but with a compelling awareness of the need for its expeditious accomplishment." *Id.* at 426. A list of citations showing the history of the *Connor* case demonstrates that the businesses of drawing specific policy lines and implementation of the results of the line-drawing are merely two aspects of the same problem: Connor v. Coleman, 99 S. Ct. 2400 (1979); Connor v. Coleman, 99 S. Ct. 1523 (1979); Connor v. Finch, 434 U.S. 949 (1977); Connor v. Finch, 431 U.S. 407 (1977); Connor v. Coleman, 425 U.S. 675 (1976); Connor v. Waller, 421 U.S. 656 (1975); Connor v. Williams, 404 U.S. 549 (1972); Connor v. Johnson, 402 U.S. 690 (1971); Connor v. Finch, 422 F. Supp. 1014 (S.D. Miss. 1976); Connor v. Finch, 419 F. Supp. 1072 (S.D. Miss. 1976); Connor v. Waller, 396 F. Supp. 1308 (S.D. Miss. 1975); Connor v. Johnson, 330 F. Supp. 521 (S.D. Miss. 1971); Connor v. Johnson, 265 F. Supp. 492 (S.D. Miss. 1967); Connor v. Johnson, 256 F. Supp. 962 (S.D. Miss. 1966).

[49] For an overview of the argument, see Kirchick, *The Continuing Search for a Constitutionally Protected Environment*, 4 Env. Aff. 515, 520-21, 527-32 (1975).

[50] Roberts, *The Right to a Decent Environment; $E=MC^2$: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 Cornell L. Rev. 674, 698 (1970).

[51] Note, *Toward a Constitutionally Protected Environment*, 56 Va. L. Rev. 458, 481 (1970).

[52] 381 U.S. 479 (1965).

[53] *See, e.g.*, Note, *supra* note 51, at 463.

the ninth amendment.[54] Even an attempt to invoke due process has been made on the ground that the destruction of the environment, or even the existence of dangerous levels of smog, entails the loss of both life and liberty.[55]

The courts have not hesitated in drawing a line that rejects each of these contentions. Relying on the test elucidated for determining the existence of fundamental rights in Justice Powell's opinion in *San Antonio Independent School District v. Rodriguez,*[56] one judge declared that he saw no guarantee "to a healthful environment implicity or explictly in the Constitution."[57] Another declined to apply the ninth amendment because "such a construction would be ahistorical and would represent essentially a policy decision."[58] And a third simply refused to "elevate to a constitutional level the concern" for a clean environment.[59] The courts' response to this claimed right has been decisive—the Environmental Defense Fund has ceased even advancing the putative right in its suits.[60]

III. The Courts Interpret NEPA

In the most recent decade Congress has passed legislation to provide for clean air,[61] to control water pollution,[62] to protect endangered species,[63] and to guarantee that federal agencies include environmental considerations in their daily decision-making.[64] All of the legislation has engendered considerable litigation, thus forcing the courts to think about an entirely new set of lines. Because the National Environmental Protection Act (NEPA),[65] with its required environmental impact state-

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[54] *See* J. Arbuckle, *supra* note 4, at 36.

[55] Kirchick, *supra* note 49, at 522.

[56] 411 U.S. 1 (1973).

[57] Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973)).

[58] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 535 (S.D. Tex. 1972). The court stated: "In effect, plaintiffs invite this Court to enact a law. Since our system reserves to the legislative branch the task of legislating, this Court must decline the invitation. The Ninth Amendment, through its 'penumbra' or otherwise, embodies no legally assertable right to a healthful environment." *Id.*

[59] Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

[60] *See* W. Rodgers, Jr., Handbook on Environmental Law 701 (1977).

[61] Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. 1978).

[62] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. 1978).

[63] Endangered Species Act, 16 U.S.C. §§ 668, 1531-1543 (1976 & Supp. 1978).

[64] 42 U.S.C. § 4332 (1976) (requiring environmental impact statements for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment").

[65] 42 U.S.C. §§ 4321-4361 (1976).

ments (EIS), has been the most adjudicated environmental law,[66] it serves as a representative example of the courts' response to environmental disputes.

Congress passed NEPA in 1969 with minimal debate and virtually no opposition—the Senate did not even call roll on the final vote—and yet, one writer describes NEPA as "the most sweeping environmental law ever enacted by a United States Congress."[68] The reason for the apparent discrepancy is that few congressmen comprehended NEPA's full meaning. At first glance it seems to be nothing more than a statement of national purpose to preserve the quality of the environment. To guarantee that purpose the Act prescribes "action-forcing"[70] procedures, of which the most important is the detailed statement that accompanies every proposed "major Federal action significantly affecting the quality of the human environment."[71] The EIS is the core of NEPA litigation, and challenges to the preparation and content of these statements soon deluged the courts.[72]

The ensuing judicial interpretation of NEPA can be divided into three phases. In the first, which lasted approximately three years, the lower courts molded the basic meaning and procedural requirements of

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[66] *See* J. ARBUCKLE, *supra* note 4, at 59.

[67] *See* [1969] U.S. CODE CONG. & AD. NEWS 2751. For a discussion of the legislative history, see F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT ch. 1 (1973); R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE ch. 2 (1976).

[68] R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH ch. 2 (1976).

[69] 42 U.S.C. § 4331(a) (1976) provides in part: "[I]t is the . . . policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ."

[70] *See id.* § 4331(b). *See generally* R. LIROFF, *supra* note 68, at 16-20.

[71] 42 U.S.C. § 4332(C) (1976).

That statement must include:

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

[72] One hundred forty-nine of these cases were decided in the first three years following the passage of NEPA, F. ANDERSON, *supra* note 67, at 246, and by 1974, more than five hundred suits concerning the preparation or content of an EIS had been filed. Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act,* 19 S. DAK. L. REV. 279, 279 (1974).

NEPA.[73] At a minimum, they agreed, agencies must comply with the action-forcing procedures, and the courts do have the charge to review agency compliance.[74] Although courts disagreed about specific components of the statute, they performed a material accomplishment by identifying the fundamental meaning of the law.

Questions about the procedural requirements and the extent of substantive review constitute the second, not yet complete, phase. It is characterized by this ongoing colloquy among the lower courts: is the court's review limited to procedural matters or does it extend to an evaluation of the agency decision? Sometimes the colloquy is between judges on the same bench.[75] The issues involved are problematic, and they are no more settled today than they were in 1974 when Judge Clark of the Fifth Circuit conceded: "Courts that have discussed, either decisionally or in dicta, whether APA review extends to the merits of the agency's final decision have reached varying results."[76]

The third phase, just maturing in the 1977-78 Term, comprises the Supreme Court's attempt to give order and uniformity to the interpretation of NEPA. In the early cases, the Supreme Court limited its involvement to the relatively technical questions of standing, timing, and the requisite comprehensiveness of an EIS. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[77] decided eight years after the passage of NEPA, the Court finally entered the colloquy in full force, harshly condemning the tactics of environmentalists and the substantive review of lower court judges.[78] Where this decision will lead is unpredictable, but for the present the Supreme Court has announced its intention to draw the line much closer to the procedural than the substantive end of the continuum.

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[73] *Cf.* Yarrington, *supra* note 72, at 280-84.

[74] In Environmental Defense Fund v. Froehlke, 368 F. Supp. 231, 239 (W.D. Mo. 1973), *aff'd sub nom.* Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974), the court stated: "By its enactment of [section] 102 of NEPA Congress intended to implement the declaration of national policy stated in [section] 101 by requiring a final EIS which would reflect proper agency study, development, description, and consideration of appropriate alternatives." 368 F. Supp. at 239.

[75] "Viewed broadly, this language plainly contemplates *imposing* a requirement of comprehensive planning on the Government when it refuses to do so itself." Sierra Club v. Morton, 514 F.2d 856, 874 (D.C. Cir. 1975) (Wright, J.), *rev'd sub nom.* Kleppe v. Sierra Club, 427 U.S. 390 (1976). "[T]he question before the Court is not what the agencies 'ought to' do, but rather what NEPA requires that they do." 514 F.2d at 893 (MacKinnon, J., dissenting).

[76] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1139 (5th Cir. 1974).

[77] 435 U.S. 519 (1978).

[78] *See id.* at 553-55, 558.

A. *Phase I: The Minimal Meaning of NEPA*

Judicial interpretation of NEPA began with Judge Skelly Wright's opinion in *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission.*[79] The most frequently cited NEPA case,[80] it profoundly influenced, and perhaps determined, the expansive reading of NEPA that followed. That influence was not wholly accidental; Judge Wright's opening sentences suggest that he fully understood the potential impact of his opinion, and had definite ideas about the role the courts would play.

> These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." [W]e must for the first time interpret the broadest and perhaps most important of the recent statutes. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.[81]

In declaring certain Atomic Energy Commission rules to be in violation of the procedures required by NEPA, Judge Wright carefully scrutinized and analyzed the meaning of NEPA. His initial premises were that the broad policy goals of section 101[82] were the heart of NEPA, and that the action-forcing provisions of section 102 were mandated so that the policy goals would be more than "lofty declarations."[83] Thus, he maintained, strict adherence to those provisions is required, not for their own sake, but for the sake of the policy underlying section 101.[84] Furthermore, "NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance,"[85] which in turn requires a " 'detailed statement' covering the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative

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[79] 449 F.2d 1109 (D.C. Cir. 1971).

[80] F. ANDERSON, *supra* note 67, at 247. Although Anderson made the statement in 1973, it certainly remains true today.

[81] 449 F.2d at 1111. Judge Wright also appears to have had definite attitudes about "material progress" and federal bureaucracies, which might account for the activism that characterizes his NEPA decisions throughout. See note 337 and accompanying text *infra.*

[82] 449 F.2d at 1112; *see* 42 U.S.C. § 4331 (1976). See note 69 and accompanying text *supra.*

[83] 449 F.2d at 1113 (quoting remarks of Senator Jackson); *see id.* at 1113 n.6.

[84] Referring to the procedural requirements of § 102, Judge Wright commented: "[T]hey are not highly flexible. Indeed, they establish a strict standard of compliance." *Id.* at 1112.

[85] *Id.* at 1113.

measures which might alter the cost-benefit equation."[86] In other words, the agency decision-making must give full consideration to environmental factors; "the mere drafting and filing of papers" is not enough.[87]

One of Judge Wright's most significant statements was that NEPA "creates judicially enforceable duties."[88] Congress did not explicitly provide for judicial review, and Judge Wright would have had equally defensible grounds for dismissal. In fact, a year earlier another judge had opined that the Act did "not seem to create any rights or impose any duties of which a court can take congnizance."[89] Although not the first to declare the right of review, Judge Wright's opinion strengthened that position.

The decision was based on rather clear procedural grounds, but, cognizant that he was propounding the seminal interpretation, Judge Wright construed the remainder of the statute in dicta. Foreseeing the possibility of using the policy goals of section 101 to review the substance of agency decisions,[90] Judge Wright suggested that a judge could invalidate an agency decision if he believed the agency had not balanced environmental costs properly or had not given due consideration to a potential environmental impact.[91] A second line of dicta, subtly different from the first, described the coalescence of the procedural requirements of section 102 and the substantive requirements of section 101, and outlined the situations where reversal might be proper.[92]

The grounds for reversal were, he contended, numerous: the court might determine individualized considerations to be absent; the court might determine that environmental factors were not considered fully; the court might determine lack of good faith. Whatever determination the court makes, however, depends on a single principle: "[A]n agency must—to the *fullest* extent possible . . . consider alternatives to its actions which would reduce environmental damage."[93] Judge Wright gave the principle practical meaning in his inchoate balancing test. He

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[86] *Id.* at 1114.

[87] *See id.* at 1127.

[88] *Id.* at 1115.

[89] Bucklein v. Volpe, No. 70-700 (N.D. Cal. 1970), *quoted in* F. ANDERSON, *supra* note 67, at 15.

[90] "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." 449 F.2d at 1115.

[91] *Id.*

[92] "But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse." *Id.*

[93] *Id.* at 1128.

contended that NEPA requires a balancing of economic gains against environmental losses.[94] The test is judge-made; NEPA orders that alternative action be considered, but nowhere does it suggest that it must be adopted, nor even evaluated according to some balance. Although one commentator advised against reading Judge Wright's test literally,[95] the test evolved until judges frequently decided litigation using cost-benefit analyses.[96]

Judge Wright's opinion laid the groundwork for the ensuing line drawing. By giving meaning to the action-forcing procedures, he guaranteed that the Act would not be merely a "paper tiger."[97] The dicta that conceived substantive review both of the merits and of the combined substantive and procedural sections was applied subsequently by many courts. But the opinion might have been less influential were not other courts receptive to the rationale. The receptivity is apparent in the courts' willingness to hear NEPA cases; that is the critical juncture of the first phase[98] for the courts might as easily have opted for extreme restraint.[99]

Rules of standing might also have prevented the courts from hearing many of these cases. Beginning with *Scenic Hudson Preservation Conference v. Federal Power Commission*,[100] however, the courts liberalized the doctrine of standing. In *Scenic Hudson* the Second Circuit declared that judicial review of Federal Power Commission actions, guaranteed by statute, extended to environmental interests.[101] The Su-

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[94] Judge Wright stated that NEPA "mandates a case-by-case balancing judgment" in which "the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs." *Id.* at 1123.

[95] F. ANDERSON, *supra* note 67, at 254. Anderson thought that Judge Wright did not "seem to mean that cost-benefit analysis or techniques should be transferred into the [section] 102 process." *Id.*

[96] See notes 151 through 156 and accompanying text *infra.*

[97] 449 F.2d at 1114.

[98] As late as 1972, however, a district judge quoted the earlier opinion of Judge Peckham of California in rejecting that point:

> [I]t is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action . . . . There is only the general command to federal officials to use all practicable means to enhance the environment . . . . It is unlikely that such a generality could serve or was intended to serve as a source of court-enforceable duties.

San Francisco Tomorrow v. Romney, 342 F. Supp. 77, 81 (N.D. Cal. 1972) (quoting Bucklein v. Volpe, No. 70-700 (N.D. Cal. 1970)), *modified*, 472 F.2d 1021 (9th Cir. 1973).

[99] APA, for example, provides adequate grounds for judicial review. *See* 5 U.S.C. § 706 (1976).

[100] 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

[101] 354 F.2d at 615.

preme Court further relaxed the standard in 1970 when it held that the requirement of standing is satisfied whenever (1) one suffers direct injury, and (2) the injury is within the zone of interest of a statutory or constitutional guarantee.[102] Because protection of the environment plainly falls within NEPA, claimants only had to show injury as a consequence of environmental damage. Although the Sierra Club was denied standing in *Sierra Club v. Morton*[103] because it purported to be acting in behalf of the environment instead of showing a direct injury to one of its members,[104] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I)*,[105] decided a year later, indicated that direct injury could be shown even when the line of injury was "attenuated."[106]

In the first phase the courts also deliberated about the meaning of "major Federal actions significantly affecting the quality of the human environment."[107] While not settling the meaning of these terms, they did formulate general guidelines.[108] Judges usually resolved doubts in favor of statutory coverage, especially if the effect of the action seemed significant.[109] Projects were deemed to be federal when the agency had the ability to influence or control their outcome.[110] To decide whether a significant effect would result courts relied on the substance of NEPA, used their own discretion in case-by-case adjudication, and looked to the intensity of the controversy.[111] The courts did not establish neat formulas, to be sure, but they did suggest, at the least, that statements would be required in close, controversial cases.[112]

Most importantly, the early cases affirmed that NEPA does command agencies to give serious attention to environmental impacts when formulating projects and programs. The courts explicitly ordered the federal bureaucracy to comply with the spirit of NEPA by strictly fol-

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[102] *See* Barlow v. Collins, 397 U.S. 159, 164 (1970); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152-54 (1970).

[103] 405 U.S. 727 (1972).

[104] *Id.* at 735.

[105] 412 U.S. 669 (1973).

[106] *Id.* at 688.

[107] 42 U.S.C. § 4332(C) (1976).

[108] For a concise and accurate summarization of the early rulings see W. RODGERS, JR., *supra* note 60, at 750-67.

[109] *See* R. LIROFF, *supra* note 68, at 166.

[110] Revenue sharing expenditures, for example, did not require the production of an EIS under this test. *See* J. ARBUCKLE, *supra* note 4, at 72.

[111] For an explanation of these and other themes that characterize the early judicial approaches, see F. ANDERSON, *supra* note 67, at 74-88.

[112] Perhaps the sole method for acquiring an intuitive sensibility concerning which projects will and which will not require an EIS is to peruse a series of decisions. *See* J. ARBUCKLE, *supra* note 4, at 70-71; W. RODGERS, JR., *supra* note 60, at 756-61.

lowing its procedures. More specifically, Judge Clark of the Fifth Circuit stated, NEPA's directives are twofold: (1) it "insures the integration of sound environmental planning principles and methods into normal agency procedures," and (2) it "contains requirements for both methodology and writing, but its principle thrust is to require documentation."[113] "At the very least, NEPA is an environmental full disclosure law;" that is, it is an attempt to make agency "decision-making more responsive and more responsible."[114] And that was a momentous development, for it insured that NEPA would not be merely a "paper tiger."

B. Phase II: The Lower Court Colloquy

Having affirmed the action-forcing procedures, the courts then had to determine exactly, or as nearly as possible, just what it was that NEPA required of an EIS. The decisions, often conflicting, constitute the second phase of NEPA development.

Consider, as an example, judicial interpretation of how much detail is required. In an early case, a district judge declared that the requisite detail extends to "all known *possible* environmental consequences."[115] Using that broad test, he rejected the agency EIS because the report included economic gains but omitted economic losses, and considered the recreational benefits of damming a river but not the recreational losses of transforming a free-flowing stream.[116]

Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit, however, rejected the assumption that Congress had not intended that the impact statement include exhaustive detail and ruled the EIS accompanying the application for two nuclear power reactors unacceptable because the discussion of alternatives did not include energy conservation.[117] He was unimpressed by the argument that since the EIS preceded the oil embargo, serious reflection about

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[113] Environmental Defense Fund v. Corps of Eng'rs, 492 F.2d 1123, 1132 (5th Cir. 1974).

[114] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 749, 759 (E.D. Ark. 1971) (*Gilham Dam I*), *vacated,* 342 F. Supp. 1211 (E.D. Ark.), *aff'd,* 470 F.2d 289 (8th Cir. 1972).

[115] 325 F. Supp. at 759 (emphasis in original).

[116] *Id.* at 759-61. The district judge rejected the study not because he personally disapproved the project, but because the study lacked the requisite detail. *Id.* at 763.

[117] Aeschliman v. Nuclear Regulatory Comm'n, 547 F.2d 622, 627, 632 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551-52 (1978) ("Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.").

energy conservation was not a pertinent detail.[118] In an earlier case, Judge Bazelon's colleague, Judge Levanthal, rejected an impact statement presented in conjunction with oil and gas lease applications because it did not include as an alternative the changing of oil import quotas.[119] He, too, was unimpressed by the agency's rationale, in this case, that such a decision could be made only by another agency, and furthermore, that Congress and the President already had resolved the issue.[120] The purpose of detail is to inform, Judge Leventhal argued, and although that does not require the most exacting inquiry, it does mandate that the agency take a hard look at all pertinent data.[121]

Most judges adhered to the general rule that the EIS need only contain information upon which an intelligent choice among several options can be made.[122] Some courts declined to evaluate agency statements, requiring only that the factual bases for differing opinions be exposed.[123] A third approach to the issue, adhered to by Judge Coffin of the First Circuit, among others, is that the impact statements are purposive; they enable the court to determine the presence of good faith decision-making; they act as full disclosure measures; and they contribute to the integrity of the decision-making process.[124] Consequently, reasoned Judge Coffin, the mere exposing of differing opinions is inadequate; the EIS that does not contain "reasoned analysis in response" lacks good faith.[125] Of course, the obscure meanings of the phrases "good faith" and "reasoned analysis" are subject to widely differing interpretations. Thus, in evaluating the content of impact statements, different judges drew variant lines.

The courts also disagreed about the requirements of the procedures leading to the final impact statement. Read carefully, NEPA mandates only that agencies consult and obtain comments from other federal agencies.[126] The courts chose to construe NEPA broadly, however, and, following the guidelines of the Council on Environmental Quality (CEQ), required agencies to circulate draft statements to other federal agencies, state and local agencies, and the public, giving them the op-

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[118] Judge Bazelon stated that "[e]nergy conservation was clearly a 'colorable' alternative relevant to the goals of the project." 547 F.2d at 629.

[119] Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834-35 (D.C. Cir. 1972).

[120] *Id.*

[121] *Id.* at 837.

[122] *See, e.g.*, Smeltzer v. Adams, 8 Envir. Rep. (BNA) 20223 (N.D. Iowa 1978).

[123] *See, e.g.*, Environmental Defense Fund, Inc. v. Hoffman, 421 F. Supp. 1083, 1088 (E.D. Ark. 1976) (mem.), *aff'd*, 556 F.2d 1060 (8th Cir. 1977).

[124] Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973).

[125] *Id.* at 1285.

[126] *See* 42 U.S.C. § 4332(C) (1976).

portunity to review and comment.[127]

Whatever procedural safeguards were required beyond the minimal procedures was an issue upon which, again, courts diverged. Judge Leventhal believed that courts could review the quality of the process leading to the production of the EIS.[128] Most courts employed a rule of reason akin to that used for evaluating the content of statements. In one case, the court remanded to the agency because the agency had neither consulted all appropriate parties nor presented opposing views throughout the reviewing process,[129] and another court rejected an EIS because the agency had not submitted the draft for comment.[130] Asserting that hearings are vital to the process of reviewing agency action,[131] the court disallowed an EIS because hearings had not been held. All of these decisions relied on the same premise: that "the mere drafting and filing of papers is [not] enough to satisfy NEPA."[132]

Uniquely, Judge Bazelon has consistently required accessory procedures, sometimes remanding and ordering agencies to use adjudicatory hearings to clarify the standards governing their discretionary decisions.[133] In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission,*[134] Judge Bazelon reasoned that because judges are

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[127] See notes 129 through 132 and accompanying text *infra.* For an overview of the process through which an EIS is developed, see S. ROSEN, MANUAL FOR ENVIRONMENTAL IMPACT STATEMENT (1976).

[128] Writing off the bench, Judge Leventhal stated:

> In any event, the court will not be confined to bare formalities but will probe the entire record to identify the choices made by the agency, to determine whether there has been a disregard of ascertainable legislative intent, to assure itself that the parties were offered a reasonable opportunity to present their position, and to find whether there has been a reasonable assessment of the interrelated policy and legal questions.

Leventhal, *Environmental Decisionmaking and the Role of the Courts,* 122 U. PA. L. REV. 509, 541 (1974).

[129] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 749, 758 (E.D. Ark. 1971) (*Gilham Dam I*), *vacated,* 342 F. Supp. 1211 (E.D. Ark.), *aff'd,* 470 F.2d 289 (8th Cir. 1972).

[130] Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 170, 172 (D.D.C. 1971).

[131] Students Challenging Regulatory Agency Procedures v. United States, 371 F. Supp. 1291, 1300 (D.D.C. 1974) (*SCRAP I*), *rev'd,* 422 U.S. 289, 321-22 (1975) (draft statement does not have to be submitted for hearing).

[132] Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1127 (D.C. Cir. 1971).

[133] *See* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375, 382 (1974). In Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), Judge Bazelon stated: "[C]ourts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *Id.* at 598.

[134] 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power

incapable of assessing the technical and scientific arguments that agencies make, the only means by which courts can be assured of responsible decision-making is to demand a comprehensive procedure.[135] In *NRDC v. NRC*, for example, he expressed displeasure with the discussion of reprocessing and waste,[136] but felt inadequate to review the discussion because the issues were not fully laid out.[137] Not wanting to intrude too extensively into agency matters, however, he refused to dictate specific methods for the agency's use in clarifying the record.[138] Indeed, he noted, the agency may have to develop altogether new procedures to meet the judicial mandate.[139]

Other judges vociferously rejected Judge Bazelon's hybrid rulemaking approach. Judge Tamm, in a concurring opinion, warned that administrative agencies would get bogged down in formalized, deliberate procedures devised merely to please the courts.[140] Justice Rehnquist, in overruling a lower court opinion by Judge Bazelon, doubted that the extended procedures would affect the quality of decision-making.[141]

Disagreements about the content of statements and the proper procedures seem insignificant when juxtaposed with the disputations about substantive review, which were the heart of the second phase controversies. Specifically, the courts debated whether they could review NEPA on its merits, and if not, whether they could substantively evaluate the procedures used.

The court in *Pye v. Department of Transportation*[142] correctly summarized the judicial attitude toward substantive review of NEPA:

> Although some courts have held that NEPA calls for judicial review of substantive agency decisions to undertake projects rather than only the adequacy of reports declaring the basis for decisions, we find no decisions in which a private plaintiff has been awarded damages or restitution on the basis of the Act.[143]

In other words the courts have traditionally declared their power of substantive review, but have never applied it in negating an agency decision.

Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[135] 547 F.2d at 645.

[136] *Id.* at 638-41, 646-53.

[137] *Id.* at 654.

[138] *Id.* at 653.

[139] *Id.*

[140] *Id.* at 660 (Tamm, J., concurring).

[141] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 548 (1978).

[142] 513 F.2d 290 (5th Cir. 1975).

[143] *Id.* at 293.

On the other hand, the most far-reaching averment of the courts' reviewing power was stated in *Environmental Defense Fund v. Corps of Engineers (Gillham Dam II),*[144] where the court stated that "[g]iven an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits."[145] After reviewing the requirements of section 101, the court declared that the action-forcing procedures of section 102 were not ends in themselves;[146] NEPA intended that courts be allowed to make substantive changes in agency decision-making.[147] Every judicial review, the court continued, should (1) determine if the agency acted within its authority, (2) decide whether the decision was arbitrary or capricious, and most importantly, (3) evaluate whether the decision met the standards set forth in sections 101(b) and 102(2)(C).[148] Because the Army Corps of Engineers did meet all three requirements, the court did not establish a precedent for overruling an agency decision on merit alone.

Two possible reasons explain why courts have not overruled agencies on substantive grounds, despite their willingness to declare it within their authority. First, the Supreme Court, as presently constituted, almost certainly would strike down such a decision quickly and harshly. Indeed, it is doubtful that a decision based on the merits alone would be judicially correct; nothing in NEPA, nor in APA, even hints that the right exists. Second, the courts have mastered the art of acquiring a substantive result through a liberal reading of the procedural requirements and therefore do not have to rely on substantive decisions. Judge Wright's reasoning in *Students Challenging Regulatory Agency Procedures v. United States (SCRAP II)*[149] is instructive: after declaring that section 101 would provide grounds for a decision on the merits, he announced that would not be necessary because the procedure used was deficient.[150]

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[144] 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973).

[145] 470 F.2d at 298.

[146] *Id.* at 294.

[147] *Id.*

[148] *Id.* at 300.

[149] 371 F. Supp. 1291 (D.D.C. 1974), *rev'd,* 422 U.S. 289 (1975). Commentators who advocate an activist judiciary are pleased with the trend. In the words of one such advocate: "Such skillful use of NEPA's procedural review mechanisms to compel thorough reconsiderations of the basic premises of agency action and the substantive soundness of environmental decisions is a creative step, reaching beyond those in the bulk of NEPA cases. SCRAP acts as an example to be imitated by others." McDonald, *The Relationship Between Substantive and Procedural Review Under NEPA: A Case Study of SCRAP v. U.S.,* 4 ENV. AFF. 157, 170 (1975).

[150] 371 F. Supp. at 1299.

On the imaginary continuum, substantive review of the merits is the opposite of limiting review strictly to procedures. District Judge Eisele's decision in *Environmental Defense Fund v. Corps of Engineers (Gillham Dam I)*[151] is the exemplary instance of a court's drawing the line near the procedural end of the continuum. Relying on legislative history, he opined that NEPA creates only procedural duties, rather than substantive rights.[152] To be sure, courts could review those procedures, but only to guarantee their inclusiveness, as stated in the specific action-forcing clauses of the Act. Even then, agency procedures may be deemed inadequate; because Judge Eisele found that not all parties were heard, that there had been no attempt to quantify variables, and that certain costs were not considered, he rejected the EIS.[153] The omissions, he believed, left the record incomplete, and therefore, he could not be certain that the decision-making had been responsible.[154]

When the procedures are adequately fulfilled, the courts can order nothing more, and for good reason, Judge Eisele contended. First, he was satisfied that Congress never expected the courts to resolve environmental conflicts—had they so intended, Congress would have declared it explicitly.[155] Furthermore, he believed, because courts operate within a system of separated powers, they should not substitute judgement upon a matter properly delegated by Congress to an executive agency.[156]

According to one commentator, Judge Eisele and others who adopted that perspective predicated their decisions on three premises: (1) NEPA language, (2) NEPA's legislative history, and (3) general theories of administrative law, which espouse agency deference.[157] The district judge in *Environmental Defense Fund v. Froehlke*[158] alluded to all three in a thoughtful opinion that discourses on the proper role of the courts. Refusing to base his decision on a choice among competing economic theories, he ruled that Congress had not intended that courts resolve the economic theory debate, and that the complainants should concentrate their effort on affecting the draft EIS.[159]

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[151] 325 F. Supp. 749 (E.D. Ark. 1971) (*Gilham Dam I*), *vacated,* 342 F. Supp. 1211 (E.D. Ark.), *aff'd,* 470 F.2d 289 (8th Cir. 1972).

[152] 325 F. Supp. at 755. Judge Eisele stated: "Apparently, the sponsors [of NEPA] could obtain agreement only upon an act which declares the national environmental policy." *Id.*

[153] *Id.* at 757-59.

[154] *Id.* at 759.

[155] *Id.* at 755.

[156] *Id.* at 751.

[157] Yarrington, *supra* note 72, at 284.

[158] 368 F. Supp. 23 (W.D. Mo. 1973), *aff'd sub nom.* Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974).

[159] 368 F. Supp. at 240. The court stated: "Congress . . . did not . . . contemplate

Although few courts today limit themselves to a procedural reading of NEPA, it is the extant legal principle for the Court of Appeals for the Ninth Circuit. In 1974 that court ruled that NEPA is a procedural statute,[160] and a year later reiterated that it would not set aside any decisions except those in derogation of the statutory procedures.[161] The Ninth Circuit tendered that approach by reference to APA section 706(2)(D), which enables reviewing courts to set aside agency decisions found to be "without observance of procedures required by the law."[162] Review in accordance with APA, rather than NEPA, limits the role of the courts to that of an overseer who guarantees that the procedures are complete.[163]

In early 1973, Hugh Yarrington predicted the emergence of a second generation of cases in which substantive review would predominate;[164] little did he know how quickly they would mature. To be sure, the decisions never relied solely on review of the merits, but instead followed the logic of *Calvert Cliffs,* in which Judge Wright had advocated molding sections 101 and 102 so the courts could review the quality of an agency's procedures.[165] It would be futile to search for a neat procedural-substantive distinction, however, because the decisions actually turn on subtle variations in methods of reviewing agency procedures in an effort to avoid outright substitution of judicial judgment.

Categorization of the second-generation cases is confusing because in these cases courts loosely used such phrases as "good faith" and "arbitrary and capricious." Even *Citizens to Preserve Overton Park v. Volpe,*[166] the leading Supreme Court opinion, offered diverse

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or anticipate that courts were to make choices and determine the merits of conflicting views," *id.*, and that "the ultimate resolution of benefit-cost questions is for the decision-makers, rather than the courts." *Id.* at 241.

[160] Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974). One writer applauds the approach as the first step toward reaching any and all substantive ends through procedural review. *See* Rosen, *Cost-Benefit Analysis, Judicial Review, and the National Environmental Policy Act,* 7 ENV. L. 363 (1977). Although Rosen's approach is possible, it certainly is not what the Ninth Circuit intends.

[161] Daly v. Volpe, 514 F.2d 1106, 1109 (9th Cir. 1975) (quoting APA § 10(e), 5 U.S.C. § 706(2)(D) (1976) and Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974)).

[162] 5 U.S.C. § 706(2)(D) (1976); *see* Matsumoto v. Brinegar, 8 Envir. Rep. (BNA) 20199 (9th Cir. 1978).

[163] "What the courts may be unwilling or unable to do through the APA and general principles of review, they may in fact be willing or able to do through a strict application of NEPA." F. ANDERSON, *supra* note 67, at 23; *cf.* Leed, *The National Environmental Policy Act of 1969: Is the Fact of Compliance a Procedural or Substantive Question?,* 15 SANTA CLARA L. REV. 303, 310 (1975).

[164] *See* Yarrington, *supra* note 72, at 293-94.

[165] *See* Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971). See notes 79 through 99 and accompanying text *supra.*

[166] 401 U.S. 402 (1971).

approaches. Justice Marshall, reviewing a decision by the Secretary of Transportation, proposed that any review of agency decisions must pose and resolve three issues: (1) whether there was authority to act, (2) whether the decision was arbitrary or capricious, and (3) whether the requisite procedural steps were followed.[167] To determine if a decision was arbitrary or capricious, the courts were authorized to undertake substantial inquiry[168] including review of the decision-making record and consideration of relevant factors,[169] but were admonished to remember that substitution of judgment would not be allowed.[170] Thus, the legacy of *Overton Park* is that arbitrary and capricious rests in the eyes of the beholder.

There is a thin line, however, that distinguishes the courts that equated arbitrary and capricious with "good faith" from the courts that equated it with some form of a balancing test.[171] Courts using good faith not only maintained a check list of procedural requirements, but qualitatively scrutinized them.[172] In *SCRAP II,*[173] for example, a three-judge district court declared an ICC decision to be arbitrary and capricious because the agency had not held hearings,[174] and the ICC had refused to alter its original decision even after receiving negative comments on the circulated draft statements.[175]

Although the good faith approach is steeped in judicial discretion, it also gives agencies the benefit of doubt rather than imposing on them the burden of proof. In *Environmental Defense Fund, Inc. v. Hoffman,*[176]

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[167] *Id.* at 415-17.

[168] *Id.* at 415.

[169] *Id.* at 420. Significantly, the Court ruled that where no administrative findings are made concurrently with the making of the decision, the court may probe the mental processes of the decision-maker to effect judicial review. *Id.*

[170] *Id.* at 416.

[171] Discussing the standard of review, Yarrington refers to the expansive reading of *Overton Park* as a "substantial inquiry" test, and the more restrictive reading as a "substantive evidence" test. Yarrington, *supra* note 72, at 290-92. *See* 401 U.S. at 415 ("[T]hough . . . the Secretary's approval . . . does not have ultimately to meet the substantial evidence test . . . § 706 require[s] the reviewing court to engage in a substantial inquiry.").

[172] As explained by Judge Leventhal: "The court does not make the ultimate decision, but it insists that the official or agency take a 'hard look' at all relevant factors." Leventhal, *supra* note 128, at 514.

[173] Students Challenging Regulatory Agency Procedures v. United States, 371 F. Supp. 1291 (D.D.C. 1974), *rev'd,* 422 U.S. 289 (1975) (*SCRAP II*).

[174] 371 F. Supp. at 1300-01.

[175] *Id.* at 1299-1302. The court found the attitude of the ICC to be "particularly troublesome," *id.* at 1302, and characterized the language of the EIS as "combative, defensive, and advocatory." *Id.*

[176] 421 F. Supp. 1083 (E.D. Ark. 1976) (mem.) (channelization by Corps of Engineers of Cache River in Arkansas), *aff'd,* 566 F.2d 1060 (8th Cir. 1977).

the final Cache River case, the court allowed the project to continue after four and one-half years of litigation because the Corps of Engineers had made an informed decision[177] that was, according to the court, neither arbitrary nor capricious.[178] The decision itself was not reviewed on the merits because "a decision made by the Executive or Congress on the basis of adequate information—such as is presented in an acceptable EIS—will not be reexamined by the Courts."[179] Similarly, the Court of Appeals for the Eighth Circuit in *Minnesota Public Interest Research Group v. Butz*[180] gave the agency the benefit of doubt after a district judge had imposed the more trying burden of proof.[181] Rejecting that approach, the court of appeals reprimanded the lower court for its unacceptably expansive approach to substantive judicial review.[182]

An important aspect of the good faith test is that under it courts cannot stop agency actions permanently; at best, they can only delay projects. For example, litigation of the B. Everett Jordan Dam in North Carolina lingered for more than seven years, but eventually the court recognized that the decision of the Corps of Engineers was not arbitrary, capricious or an abuse of discretion.[183] In an earlier case, Judge Eisele grasped the point with considerable insight when he noted that lobbying with the decision-makers was the only possible method of ultimately stopping construction on the project in question.[184] The court can repeatedly return an EIS to the agency that fathered it, but when the statement is complete and the procedures followed in shaping it are satisfactory, there is nothing else the courts can do: unless, of course, they evaluate the decision on its merits, as a liberal reading of *Overton Park* suggests may be permissible.[185]

Before turning to that approach it will be useful to recall Judge

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[177] 421 F. Supp. at 1089.

[178] *Id.*

[179] *Id.*

[180] 541 F.2d 1292 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

[181] Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276, 1298 (D. Minn. 1975) (in determining whether the Forest Service had acted in good faith compliance with NEPA § 102, the test was one of good faith objectivity rather than subjective impartiality), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

[182] 541 F.2d at 1299. The court stated that when the record is complete and the data support the conclusions, the "resolutions of the scientific conflict presented by it are matters for the experts, not the courts." *Id.* at 1305.

[183] Conservation Council v. Froehlke, 435 F. Supp. 775, 797 (M.D.N.C. 1977).

[184] Judge Eisele wrote: "[P]laintiffs' only chance to stop the . . . project . . . lies in their ability—perhaps with the aid of others—to convince the decision-makers of the wisdom and correctness of their views on the merits." Environmental Defense Fund, Inc. v. Corps of Eng'rs, 342 F. Supp. 1211, 1216-17 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

[185] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

Bazelon's hybrid rulemaking because it falls on the line that distinguishes substantive review of procedure from substantive review of merits. In a number of cases—*Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*[186] and *Aeschliman v. Nuclear Regulatory Commission*[187] are the most famous recent ones—he remanded to agencies with the stipulation that they amend or formalize their procedures.[188] Although the administrative consequences of this action may be costly, the reasoning is not unfounded: because courts are incapable of understanding, not to mention evaluating, technical and scientific data,[189] the courts' only refuge to insure agency responsibility is to certify that the agency has taken a critical look at all relevant information and options.[190]

On the other hand, Judge Leventhal espoused the liberal line of *Overton Park* when he stated: "In my view, the 'hard look' metaphor requires more than subjective good faith, which would be essentially untestable; it requires an analysis of the environmental consequences sufficient to convince a court that they have been considered."[191] The implication of this procedure is obvious. If the judge is not convinced by the presentation of information that the agency decision was correct, he can reject the impact statement. This approach was first announced by Judge Wright in his incipient interpretation of NEPA, with the pronouncement that "NEPA mandates a case-by-case balancing judgment on the part of federal agencies."[192] Introduced as dicta, this balancing

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[186] 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[187] 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[188] *See* 547 F.2d at 632; 547 F.2d at 653-54 & n.58.

[189] *See, e.g.*, Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 547 F.2d 633, 646 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[190] Concurring in International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), Judge Bazelon noted:

> I do not have the technical know-how to agree or disagree with that evaluation—at least on the basis of the present record.
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> . . . .
>
> This "new era" . . . means instead that courts will go further in requiring the agency to establish a decision-making process adequate to protect the interests of all "consumers" of the natural environment.

Id. at 651 (Bazelon, C.J., concurring). This approach to judicial review is innovative and judge-made, to be sure, but it does stop short of the balancing that characterizes the "substantial inquiry" approach.

[191] Leventhal, *supra* note 128, at 528.

[192] Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

test evolved into a rule of law imposed by other courts. A year later, for example, a court of appeals based its decision, "in large part," on a "balancing, on the one hand, of the benefits to be derived from flood control, and on the other, of the importance of a diversified environment."[193] The test was subsequently extended, and sometimes altered,[194] by courts until it reached fruition in *Minnesota Public Interest Research Group v. Butz.*[195]

In *MPIRG* a Minnesota district judge was asked to declare inadequate the EIS prepared by the Forest Service in conjunction with its proposed policy for harvesting timber in the Boundary Waters Canoe Area. The trial record documented an exhaustive survey by the Forest Service showing that a special planning team had spent three years collecting information, acquiring field inventories, holding informal public workshops, and encouraging the involvement of interested citizens.[196] When CEQ censured the completed draft statement, citing its insufficient consideration of alternatives,[197] the team contrived a series of matrices for ascertaining the impact of management activities and uses, and assessing six alternative proposals.[198] After the revised draft was filed, the agency then extended the time for public comment from the usual forty-five days to sixty days.[199]

Judge Lord declared the description and evaluation of actions and impacts, the determination of impacts, and the consideration of alternatives to be inadequate.[200] It was impossible to judge the matrices, he said, because they were nothing more than unexplained conclusions.[201] The Forest Service had "grossly undervalue[d] virgin timber,"[202] and, indeed, all of the numerical values were "arbitrarily assigned" and "without explanation."[203] Displeased with the cost-benefit analysis, the district judge refused to accept the EIS for the simple reason that he disagreed with the resources-management conclusion in it.[204]

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[193] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 301 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973).

[194] *See, e.g.,* Scientists' Inst. for Pub. Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973) ("[T]he initial and primary responsibility for striking a balance between the competing concerns must rest with the agency itself, not with the courts.").

[195] 401 F. Supp. 1276 (D. Minn. 1975), *rev'd,* 541 F.2d 1292 (8th Cir. 1976).

[196] 401 F. Supp. at 1289.

[197] *Id.* at 1290.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 1308.

[201] *Id.* at 1309.

[202] *Id.* at 1312.

[203] *Id.* at 1322.

[204] Judge Lord wrote: "This Court is convinced that an adequate EIS would show that

Although many commentators have applauded decisions similar to the one in *MPIRG*,[205] most lower court judges have been reluctant to extend the line beyond demanding a "hard look." Judge Eisele recognized the danger involved in reviewing the substance of economic analyses when he noted that cost-benefit equations are numerous and often esoteric.[206]

Although no single dominant line of reasoning unfolded during the second phase, trends were apparent. First, most courts were willing to review more than the minimal procedural requirements of a narrow reading of NEPA. Second, although some courts defended substantive review of the merits of a decision,[207] no court rejected an impact statement solely on those grounds[208] because judges mastered the technique of reaching substantive questions via a close and demanding interpretation of the action-forcing procedures.[209] Third, most courts utilized a good faith test,[210] which is not surprising because it is unobtrusively based upon reasonableness. Fourth, the reasonableness test was also applied to the content of impact statements. Judge Bazelon's test, perhaps the most efficient of all, stood by itself between the good faith and substantial inquiry tests.[211]

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logging destroys the primitive character of [the area] and that it should not be used as a management tool." *Id.* at 1334 (footnote omitted). Thus, four years after Judge Skelly Wright's invocation for a "finely tuned" and "systematic" balancing, Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1113 (D.C. Cir. 1971), Judge Lord unabashedly acceded.

[205] Almost all of the law review literature encourages judicial activism in reviewing NEPA. *See, e.g.*, Oakes, *Substantive Judicial Review in Environmental Law*, 7 ENV. L. REP. 500029 (1977); Rosen, *supra* note 160; Yarrington, *supra* note 72.

[206] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 740 (E.D. Ark. 1971), *vacated*, 342 F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972).

More recently, the Court of Appeals for the Second Circuit reaffirmed that "[e]vidence-weighing must be left to the agency making the policy decision." County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1383 (2d Cir. 1977)., *cert. denied*, 434 U.S. 1064 (1978).

[207] *See, e.g.*, Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

[208] See text accompanying notes 142 through 150 *supra*.

[209] *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 749 (E.D. Ark. 1971), *vacated*, 342 F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972).

[210] *See, e.g.*, Students Challenging Regulatory Agency Procedures v. United States, 371 F. Supp. 1291 (D.D.C. 1974), *rev'd*, 422 U.S. 289 (1975) (*SCRAP II*). See notes 171 through 182 and accompanying text *supra*.

[211] *See, e.g.*, Aeschliman v. Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). See notes 186 through 190 and accompanying text *supra*.

C. *Phase III: The Supreme Court as Elder Statesman*

That the Supreme Court has avoided most of the fray over NEPA is explained, in part, by the recent advent of environmental law as a matter of national concern. But the Court's reticence also seems to reflect its prudent policy of allowing lower courts to pursue independently their NEPA colloquy.

The Court first reviewed NEPA, albeit tangentially, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I)*.[212] Five law students, who comprised SCRAP, asked the ICC to invoke its power to suspend the railroads' temporary surcharge on freight rates in order to determine their lawfulness.[213] SCRAP argued that because the rate hikes applied to most freight, they would discourage the use of recyclable materials, and therefore adversely affect the environment.[214] At the least, the students contended, the ICC should have prepared an EIS that acknowledged the possibility of a detrimental environmental effect.[215] Upon the refusal of the ICC to restrain the railroads' collection of the surcharge, SCRAP brought suit in district court for an injunction.[216] A three-judge district court agreed with SCRAP and enjoined the rate increases.[217]

In overruling the lower court, the Supreme Court outlined two perspectives to guide line-drawing under NEPA. In granting standing to SCRAP,[218] the Court opened its dockets to environmentalists, with few restraints. The conclusion is obvious when one looks at SCRAP's reasoning. The rate hike would have discouraged the use of recyclables, resulting in aggrandized use of natural resources, some of which would have been taken from the Washington area.[219] In addition, the members of SCRAP would suffer direct injury, according to the Court, because they vacationed in Washington National Parks where the results of the intensified discarding of refuse would appear.[220]

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[212] 412 U.S. 669 (1973).

[213] *Id.* at 675.

[214] *Id.* at 676.

[215] *Id.* at 679.

[216] *Id.* at 678.

[217] *Id.* at 681-82.

[218] *Id.* at 685.

[219] *Id.* at 688.

[220] *Id.* In granting standing to the members of SCRAP in *SCRAP I*, the Court handily employed the "injury in fact" test for standing developed in Sierra Club v. Morton, 405 U.S. 727, 733 (1972). The point of difference in the results of the two cases was that in *Sierra Club* no individual member of the club had alleged a specific personal injury, *id.* at 735, whereas in *SCRAP I*, the injury alleged was potentially more widespread than that in *Sierra Club* and "the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were

Second, the Court rejected the district court's expansive reading of NEPA that extended to courts the right to enjoin *any* federal action.[221] Both the legislative history and statutory language, the Court declared, confirmed that NEPA was "not intended to repeal by implication any other statute."[222] Since Congress had given exclusive jurisdiction for suspending rate increases to the ICC, and thereby deliberately denied courts the power of relief, NEPA could not, according to the Court, be invoked to enjoin the rate increase.[223] Hence the Court read NEPA literally, though restrictively in *SCRAP I.*

Environmentalists do not give up easily.[224] Two years later, in *Aberdeen and Rockfish Railroad v. Students Challenging Regulatory Agency Procedures (SCRAP II),*[225] the Court propounded its first significant interpretation of NEPA. Again displacing the lower court's expansive reading with a more narrow one, the Court first handled SCRAP's complaint that there had been no EIS at the oral hearing prior to the final rate proposal[226] by holding that NEPA merely requires that the EIS "accompany *the proposal* through the existing agency review processes,"[227] and therefore, until there is a proposal, there is no need for an EIS.[228]

Having chosen initially not to include an impact statement with the final proposal, the ICC reconsidered its position and reopened the investigations one month later;[229] it suspended the rate increases, formulated a draft statement, and two months later concluded that the rate in-

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claimed to be affected." 412 U.S. at 689. To the argument that the members of SCRAP should be denied standing because their injury was no different from that of any other injured party, the Court replied: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions would be questioned by nobody." *Id.* at 688.

[221] The Court cited Arrow Transp. Co. v. Southern R. Co., 372 U.S. 658 (1963) for the proposition that the courts may not through injunctions suspend implementation of rate increases pending the decision of the Interstate Commerce Commission on the lawfulness of the increase, since by virtue of § 15(7) of the Interstate Commerce Act, that authority rests exclusively in the Commission. 412 U.S. at 691.

[222] 412 U.S. at 694.

[223] *Id.* at 691. See note 221 *supra.*

[224] Judge Clark of the Fifth Circuit expressed what must be a common feeling among judges by beginning an opinion as follows: "This case involves yet another clash between a federal agency and environmentalists over a proposed development of the nation's resources. The judicial focus, blurred as usual by the lack of technical and scientific expertise . . . ." Sierra Club v. Morton, 510 F.2d 813, 817 (5th Cir. 1975).

[225] 422 U.S. 289 (1975).

[226] *Id.* at 298, 319-20.

[227] *Id.* at 320 (emphasis in original).

[228] *Id.* at 320-21.

[229] *Id.* at 301.

creases would not adversely affect the environment.[230] The district court then ruled that by choosing to reopen the investigation, the ICC had obligated itself to begin the review procedures anew,[231] but the Supreme Court disagreed. In the judgment of the Court environmental considerations had pervaded the entire process,[232] and reconsideration of the original order by the ICC in light of the EIS constituted good faith.[233] The Court was satisfied that by "integrating environmental factors" into the reopened rate structure, the ICC had reached the same decision it would have reached had it never proposed the first order.[234] In so ruling, the Court implied that it was not interested in trivial procedural details if the general purpose of NEPA—agency consideration of environmental factors in decision-making—was assured.

The Supreme Court also rejected the lower court's judgment that the EIS was inadequate because it had not taken the underlying rate structure into account.[235] The Court recognized that the order was a general rate increase formulated in response to an emergency financial crisis,[236] and that it was the prerogative of the ICC, not the courts, to evaluate the underlying rate structure separately, if it desired.[237] Thus, for the second time, the Court rejected the expansive reading of NEPA. Specifically, the Court addressed the question of timing, but more importantly, it indicated that agencies will be given considerable discre-

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[230] *Id.* at 301-02.

[231] Students Challenging Regulatory Agency Procedures v. United States, 371 F. Supp. 1291, 1300 (1974), *rev'd,* 422 U.S. 289 (1975); *see* 422 U.S. at 305.

[232] 422 U.S. at 321.

[233] *See id.* at 321, 327.

[234] *Id.* at 322.

[235] *Id.* at 325-26.

[236] *See id.* at 299, 323.

[237] *Id.* at 326. Arguing that it is within the discretion of the ICC to determine whether there is a need for a separate proceeding to consider the propriety of specific rate changes, the Court explained:

> [T]he "action" was taken in response to the railroads' claim of a financial crisis; and the inquiry, true to our decision in United States v. Louisiana . . . was primarily into the question of whether such a crisis . . . existed, leaving primarily to more appropriate future proceedings the task of answering challenges to rates on individual commodities or categories thereof. The point is that it is the latter question . . . which may raise the most serious environmental issues. The former question . . . raises few environmental issues . . . .

Id. at 323-24 (footnote omitted). Thus:

> The decision of the lower court, therefore, to deem the "federal action" . . . to include an implicit approval of the underlying rate structure was inaccurate and led it to an entirely unwarranted intrusion into an apparently sensible decision by the ICC to take much more limited "action" in that proceeding and to undertake the larger action in a *separate* proceeding better suited to the task.

Id. at 326 (footnote omitted) (emphasis in original).

tion within the limits of showing good faith.

In the following year, in *Flint Ridge Development Co. v. Scenic Rivers Association,*[238] the Court ruled that an agency's production of an EIS is not obligatory when NEPA conflicts with other statutory authority.[239] By statute, developers of land purchased through interstate sales were required to file a disclosure statement[240] which automatically became effective after thirty days unless it was facially defective.[241] Obviously an EIS could not be completed within that time.[242] Relying on NEPA language requiring compliance to the "fullest extent possible,"[243] and *SCRAP I,*[244] the Court unanimously ruled that the EIS was unnecessary.[245]

The Court ruled on the broader meaning of NEPA in *Kleppe v. Sierra Club,*[246] and, in overruling a lower court, again tightened the reins. Specifically, the Court held that coal leasing in the Northern Great Plains Region did not constitute major federal action[247] and therefore did not call for production of an impact statement.[248] In contrast to the court of appeals, the Court found no evidence of an extant regional program.[249] Consequently, there was nothing to analyze.[250] The Supreme Court also disputed the court of appeals' belief that a regional plan was being contemplated, and, even if one was being planned, NEPA would not apply since the four-part balancing test contrived by the lower court[251] was not statutorily mandated.[252] Finally, the Court

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[238] 426 U.S. 776 (1976).

[239] *Id.* at 788.

[240] *Id.* at 778-79. The disclosure statement is required by 15 U.S.C. §§ 1704-1706 (1976).

[241] 426 U.S. at 781; *see* 15 U.S.C. §§ 1704, 1706(a) (1976).

[242] 426 U.S. at 788-89.

[243] *Id.* at 787.

[244] *Id.* at 788.

[245] *Id.* at 791.

[246] 427 U.S. 390 (1976).

[247] *Id.* at 399.

[248] *Id.* at 414-15.

[249] *Id.* at 400. The court of appeals had found that action which would require an EIS was being "contemplated," and that, while "contemplation" alone will not suffice to require an EIS, the court may at some point prior to the final report on a proposal order production of an EIS. Accordingly, the court of appeals devised a balancing test, applied it, and ruled that an EIS was necessary. The Supreme Court heartily disagreed. *Id.* at 404-06.

[250] The Court noted that "[t]here would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA." *Id.* at 402.

[251] The balancing test was composed of the following factors: 1) the likelihood of the program's coming to fruition, 2) the availability of information, 3) whether the commitments were irretrievable, and 4) the severity of the environmental effects if the plan were implemented. *Id.* at 405. See note 249 *supra.*

[252] 427 U.S. at 405-06. "The statute clearly states when an impact statement is re-

expressed its reticence over becoming involved in agency politics by requiring a comprehensive plan.[253]

Kleppe succinctly laid out the Court's attitude toward judicial enforcement of NEPA. It construed NEPA narrowly by holding that impact statements will not be forced on agencies prior to the formulation of a program. It rejected judge-made tests employed by lower courts: NEPA does not mention, and the courts cannot mandate a balancing test in deciding whether an EIS is required. It declared that NEPA will be reviewed according to the more limited good faith reading of *Overton Park:*[254] agencies have considerable discretion, especially when making decisions that require technical expertise. Gradually, but purposefully, the Court injected its views on where to draw the line over which the judiciary should not step in interpreting NEPA.

The Supreme Court virtually ordered the federal judiciary to defer to agency discretion in a recent NEPA case, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[255] In a strongly worded and often biting opinion that forthrightly addresses judicial re-

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quired, and mentions nothing about a balancing of factors." *Id.* at 405. The Supreme Court was adamant, and reminded the court of appeals that:

> The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.*

Id. at 406 (emphasis in original).

[253] Showing a wide margin of judicial deference to agency discretion, the Court concluded that if the agency had taken a "hard look" at the pertinent environmental consequences, *id.* at 410 n.21, the courts had no right, let alone the expertise, to involve themselves in such matters. "Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. . . . Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately." *Id.* at 412 (citation omitted).

[254] *See id.* at 410 n.21 (quoting Natural Resources Defense Council, Inc. v. Morton, 459 F.2d 827 (D.C. Cir. 1972)).

[255] 425 U.S. 519 (1978). In *Vermont Yankee* the Supreme Court consolidated for purposes of decision two cases decided by the Court of Appeals for the District of Columbia Circuit: Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976) and Aeschliman v. Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976). The following facts summarize the events that gave rise to the legal issues decided by the Court in *Vermont Yankee.* In *NRDC v. NRC* the court had disallowed use of an agency rule and had remanded, because of procedural deficiencies under Judge Bazelon's test, for consideration of the nuclear power plant's operating license. 547 F.2d at 654-55 & n.64. In *Aeschliman* the same court remanded the orders granting petitioners the right to construct two water nuclear reactors because the agency had not seriously considered energy conservation as an alternative and because the final report had not described all the relevant factors in terms understandable to a layman. *Id.* at 629-32.

view of NEPA, Justice Rehnquist admonished courts "to perform their appointed function."[256] From the opening sentence, he elucidated that the case turned on the proper role of courts within the scheme of government.[257] Enunciating the strictures of the APA, he affirmed that "agencies are free to grant additional procedural rights in the exercise of their discretions, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."[258] For over forty years Supreme Court decisions had emphasized the rule of agency discretion,[259] and thus Justice Rehnquist was concerned that the lower court had "seriously misread or misapplied the statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress."[260] Having set the tenor, he then turned his attention to the facts.

After a lengthy recounting of the agency procedures and the court of appeals' reasoning,[261] Justice Rehnquist applied the general principles explicated at the outset of the opinion to the specific procedural questions. He restated a history of prior Court opinions on administrative law granting discretion to agencies, absent unique circumstances, in formulating their procedural rules,[262] and cited the legislative history of the APA as support for that stance.[263] Furthermore, there are practical reasons why courts should abstain from interfering with agency procedures: "[T]he inherent advantages of informal rulemaking would be totally lost;"[264] agencies are reviewed according to information presented at the hearing, even though that information might not have been available when the rule was made;[265] and advocates of judicial interference in agency procedures misconceive the nature of judicial review of agency action.[266] Moreover, nothing in NEPA permits the courts to disregard precedent, APA, and practical procedural problems.[267] Consequently, the Court remanded the rule with the directive that it be reviewed

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[256] 425 U.S. at 558.

[257] *See id.* at 524-25.

[258] *Id.* at 524.

[259] *Id.*

[260] *Id.* at 525.

[261] *Id.* at 525-37.

[262] *E.g., id.* at 543-45 & n.18, (quoting Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976) (quoting SEC v. Chenery Corp., 332 U.S. 194 (1947))); FCC v. Schreiber, 381 U.S. 279 (1965).

[263] 435 U.S. at 545-46.

[264] *Id.* at 547.

[265] *Id.*

[266] *Id.*

[267] *Id.* at 548.

according to the correct standards, rather than according to some "notion of which procedures are 'best' or most likely to further some vague, undefined public good."[268]

In the *Aeschliman* segment[269] of the decision, the Court reviewed for the first time the extent to which alternatives must be scrutinized. In light of the previous exhortation against judicial intrusion into agency matters, it comes as little surprise that Justice Rehnquist applied a rule of reasonableness in this context, absolving agencies of any responsibility for looking into all possible options.[270] Under this standard of review, the agency's decision to disregard energy conservation as an alternative was upheld.[271] Placed in historical context the decision appears even more valid since the oil embargo had not yet occurred and CEQ guidelines had not yet mentioned energy conservation as a necessary alternative.[272] Satisfied with the procedures used to discount energy conservation, the Court regarded the decision as neither arbitrary nor capricious.[273] After accusing one of the litigants of "unjustified obstructionism,"[274] Justice Rehnquist found that the final report was complete and understandable by a layman.[275]

Justice Rehnquist ended the opinion, as he began it, with a lesson in American government. Whereas the introductory lecture explained the rule of agency discretion, the concluding one elucidated the proper function of courts in America. Even if the decision to use nuclear energy

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[268] *Id.* at 549 (footnote omitted).

[269] *Id.* See note 254 *supra.*

[270] Justice Rehnquist wrote: "[T]he concept of alternatives must be bounded by some notion of feasibility." 435 U.S. at 551. Expounding upon this theme in a most definite manner, he continued:

> "[T]he detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

Id.

[271] *Id.* at 555.

[272] *Id.* at 552.

[273] *Id.* at 554.

[274] Saginaw, one of the litigants in the *Aeschliman* case, had refused a request by the Atomic Energy Commission to make its dissatisfaction with the draft EIS clearer. *Id.*

[275] The report, he explained, was not intended as "a full technical exposition of every facet of nuclear energy, but rather the ACRS's position, and reasons." *Id.* at 556. He chided the lower court for its decision to remand the report, stating that "the putative reason for the remand was that the public did not understand the report, and yet *not one* member of the supposedly uncomprehending public even asked that the report be remanded. This surely is, as petitioner Consumers Power claims, 'judicial intervention run riot.' " *Id.* at 557 (emphasis in original).

is wrong, he discoursed, Congress has decided to the contrary, and the congressional determination is "*not* subject to reexamination in the federal courts under the guise of judicial review of agency action."[276] In addition, he argued that because Congress' NEPA mandate is procedural in nature, the courts' proper function is to insure a responsible agency decision, not to substitute judgment.[277]

Although one could conceivably construe the decision narrowly, Justice Rehnquist's pointed rhetoric suggests that the opinion is a conscious attempt to prod the lower courts in an area where they had become lax. He assumes that when judges administer hybrid rules or review agency decisions according to a liberal rendition of the arbitrary and capricious standard, they have strayed too far from the statutory language of NEPA, APA, and the constitutional principles of separation of powers.

That the Supreme Court intended to tighten the reins on wandering judges explains the firm, almost angry, language used by Justice Rehnquist. Even the specific issues adjudicated in *Vermont Yankee* were tied to broader theoretical principles. Judge Bazelon's procedural orders, for example, did not constitute an isolated instance of judicial activism, rather, the orders were the most recent implementation of a theoretical approach he had advocated for some time.[278] Thus, Justice Rehnquist not only rejected the approach used in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission,*[279] but also enumerated the administrative problems it engendered. The interpretation of alternatives, unlike the Court's previous evaluation of such technical features as standing and timing, also dealt directly with the theoretical status of the courts. It would be premature, however, to suggest that *Vermont Yankee* concluded the third phase in the evolution of NEPA because one cannot predict how courts will apply the decision subsequently. But if the lower courts pay attention to Justice Rehnquist's lessons, the expansion of NEPA will have peaked in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*[280] and *Aeschliman v. Nuclear Regulatory Commission*[281] at least while the current Court sits.

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[276] *Id.* at 558 (emphasis in original).

[277] *Id.*

[278] See notes 133 through 139 and accompanying text supra.

[279] 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[280] 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[281] 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S 519 (1978).

The systematic review of NEPA litigation suggests the following conclusions. The heart of the process by which courts develop a standard of review, or draw a line, is the ongoing colloquy among judges, directed at the attainment of a commonly held, acceptable position. Indeed, the process is not unlike congregating a group of scholars in a classroom and constraining them to enounce a judgment on a specific topic. Each judge brings with him preconceptions that influence his written opinions, and those opinions comprise the communication, and sometimes debate, that gradually gravitates toward a prevailing posture. As with a congregation of scholars, there are isolated judges who cautiously hold back or gallantly march forward. The final line is not preordained nor is it absolute, for law is not "discovered." The observation is not novel, as any student of the Supreme Court holdings on obscenity, capital punishment, and church-state relations can attest. But it is worth restating because it is essential to the process of line-drawing, especially in the interpretation of NEPA.

Less frequently cited, but equally prominent, is the lower federal court participation in establishing the prevailing posture. NEPA litigation illustrates this phenomenon well, although its recency may limit the generalizations that can be fairly inferred. Indeed, NEPA case law has been formulated almost exclusively by lower courts. For example, the influential *Calvert Cliffs'*[282] opinion by Judge Wright precluded, and perhaps determined, both the courts' receptivity to NEPA litigation and the expansive interpretations of NEPA employed by some courts. Conversely the Supreme Court has not initiated any of the proposed process lines. That fact is significant because it shows that the lower courts have determined the contents of the colloquy and, therefore, have affected immeasurably the eventual standard. To be sure, NEPA litigation is embryonic as compared to court review of free speech, and there are substantial differences between constitutional and statutory interpretation. Nevertheless, the reason the Supreme Court's role has been minimized is that the Court, it seems fair to conjecture, has chosen to pursue the role of "elder statesman" in this area of law by consciously having permitted the lower courts to nurture a standard by means of routing interpretation and application of the statute, while always watching and prepared to enter the fray when technical language needs clarification, or, as in *Vermont Yankee,* when a derailed colloquy needs redirection.

In light of *Vermont Yankee,* the courts' role appears well-defined. Despite NEPA's substantive section,[283] the congressional mandate is

[282] Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). See notes 79 through 99 and accompanying text *supra.*

[283] *See* 42 U.S.C. § 4331 (1976).

essentially procedural, requiring that review by the courts be limited to the procedures used to generate a decision and cannot be extended to a substantive evaluation of the merits of that decision. Even the review of procedures is limited: a court may invalidate a procedure only when it is so flawed that the resulting decision is arbitrary and capricious.[284]

Attempting to aid and direct the lower courts, the Suprme Court has tried to clarify nebulous terms by imposing upon them the standards of good faith and reasonableness.[285] Justice Rehnquist wrote in *Vermont Yankee,* for example, that to overturn proceedings because of a single alleged oversight on a peripheral issue "borders on the Kafkaesque."[286] Where doubt is present, courts are obliged to defer to agency discretion. On paper the standard is clear and well-defined, but because it encompasses terms like reasonableness and good faith and orders human judges to apply them, the colloquy certainly will continue and the line inevitably will fluctuate.

IV. A Prescriptive Analysis

To describe the judicial interpretation of environmental litigation is not difficult; to prescribe the correct interpretation requires considerably more skill. The task is lightened, however, because the Supreme Court has adjudged these cases with a proper devotion to the constitutional framework necessary to sustain a working representative democracy. It has interpreted NEPA correctly and has abstained from the political thicket as befits the least dangerous branch. And most importantly, it has evidenced allegiance not only to the separation of powers but to the "political capacity of the people, and . . . its sense of moral responsibility,"[287] which antecedes those institutional contrivances. The remainder of this paper will explicate briefly three presuppositions that underlie the Court's interpretation of NEPA.

A. The Constitutional Structure

There should be a healthy respect for the structural foundations of American government underlying any adjudication of environmental disputes. Indeed, the gravamen of many lower court decisions is that in

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[284] The Court noted in *Vermont Yankee* that upon remand the court of appeals would be free to determine whether the rule under which Vermont Yankee's license had been considered was arbitrary and capricious under § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(D) (1976), but that it could not hold the rule "invalid because of the inadequacy of the agency procedures." 435 U.S. at 535 n.14.

[285] *See* 435 U.S. at 556-58.

[286] *Id.* at 557.

[287] A. Cox, *supra* note 15, at 117 (quoting Thayer, John Marshall 106-07 (1920)).

their haste to attain good results that will help effect a healthy environment, judges frequently ignore the importance of the structural foundation. To cite one example, when District Judge Miles Lord rejected the Forest Service's impact statement for logging in the Boundary Waters Canoe Area,[288] he exhibited an intense desire to protect the environment;[289] but he also exhibited a merely rudimentary understanding of the import of institutional arrangements in the body politic. He forgot, or ignored, that the Founding Fathers enshrined the specific institutional arrangements of representative government and checks and balances because they were the most satisfactory means of guaranteeing the fruits of democracy without suffering its vices.

In making a policy decision about the use of the Boundary Waters Canoe Area, Judge Lord transgressed the role assigned the courts by the Constitution. Whenever the constitutional framework is upset, whether by executive usurpation of power, congressional abuse of authority, or judicial intrusion into the function of the other branches, the substitution of government by men for government by laws becomes a real threat. In the words of one commentator: "To dismiss adherence to the 'rule of law' observance of the limitations imposed by a written Constitution is to strike at the very root of our democratic system."[290] Chief Justice Burger recently reaffirmed that belief in the "snail darter" case.[291] Enacting the Court's role as teacher, he quoted Sir Thomas More on the importance of law:

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal . . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[292]

The essence of rule by law, and the purpose of the seemingly myriad structural devices that permeate the Constitution, is to protect against arbitrary power, which is why Chief Justice Burger wrote that "in our Constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional actions by judicially decreeing what accords with 'common-sense and the public weal.' "[293]

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[288] Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276, 1324-25 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

[289] *See, e.g.*, 401 F. Supp. at 1331.

[290] R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 288 (1977).

[291] Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

[292] *Id.* at 195 (attributed to Sir Thomas More in Bolt, *A Man For All Seasons*, act I, at 147 (Heineman ed. 1967)).

[293] 437 U.S. at 195.

Although it is naive to believe that courts do not make law when filling the interstices of statutes or to ignore the inevitable policy impact of court decisions, it would be wrong to disregard that originally "the judiciary was excluded from policymaking."[294] Using judgment, rather than will, the courts were intended to do nothing more than "declare the sense of the law."[295] The judge who exceeds that mandate presumes himself to be above the law.

The judge-made balancing test exemplifies government by the judiciary. NEPA orders agencies to discuss alternative courses of action when formulating impact statements because Congress wanted to assure that no feasible alternative was left unexplored. Congress did not order agencies, explicitly or implicitly, to compare alternatives, to evaluate alternatives according to a cost-benefit scale, or even to choose the best alternative assuming it could be recognized; Congress mandated only that agencies *should consider* alternative solutions. And yet, judges impose on agencies these balancing tests and cost-benefit analyses, rejecting impact statements that do not comply. Justice Marshall once even chastised his brethren for rejecting a contrived test, and applauded the lower court for "seiz[ing] the opportunity to devise a different and effective remedy."[296] Judge Bazelon's compulsory procedures, "whether or not traditional administrative rules require it,"[297] illustrate the practical dilemma agencies encounter when government is by men rather than by the rule of law. Under Judge Bazelon's test, agencies can never be certain if their decision-making process is sufficient because putative legal standards carry so little weight.[298] Balancing tests and imposed procedures are abitrary and capricious policy decisions made by judges whose ideas about right and wrong interfere with the legal process.

Because courts possess neither purse nor sword, they really have no legitimate power of enforcement; what they do have is an authority that rests on the perceived legitimacy of their general posture and specific decisions.[299] When the people perceive that a judge's posture is political and his decisions tend toward policymaking, they may be prone to challenge that authority. The apex, of course, is an altogether politicized judiciary, which effectuates increased noncompliance, and even out-

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[294] R. BERGER, *supra* note 290, at 300.

[295] THE FEDERALIST No. 78 (A. Hamilton) 517 (P. Ford ed. 1898) (Founding Fathers' notions of and intentions for the judiciary).

[296] Kleppe v. Sierra Club, 427 U.S. 390, 416 (1976) (Marshall, J., concurring in part and dissenting in part).

[297] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

[298] See notes 133 through 139 and accompanying text *supra*.

[299] A. Cox, *supra* note 15, at 99-118.

right resistance.[300]

It would be imprudent to surmise whether the excessive judicial intrusion into agency environmental decisions has weakened the courts' authority, especially because environmental issues lack the immediate impact on a wide range of persons that characterizes a busing or school prayer decision. There are, however, examples of administrative and congressional reaction. Following the *Calvert Cliffs'* decision, for example, Congress changed the AEC licensing procedure,[301] and in 1973, Congress exempted the Alaskan pipeline from further NEPA compliance and withdrew from the courts the right to review pipeline decisions.[302] NEPA's first amendment also reflected congressional reaction to judicial activism. When the United States Court of Appeals for the Second Circuit ruled that the Department of Transportation could not rely on states to prepare impact statements,[303] DOT responded by halting highway construction throughout the circuit, producing intense political pressure and culminating in the amending of NEPA to allow the states to prepare the impact statement.[304]

It is not unusual for Congress to overrule the courts by amending laws, nor is it unusual for congressmen to berate the judiciary. But the examples do suggest that the courts, by interpreting NEPA expansively, have lost a small measure of their authority. District Judge Oliver, in an insightful opinion, wrote of the necessity of tempered decisions, opining that "the failure of courts to devise better procedures to deal expeditiously with the Nation's belated recognition of its environmental problems" would lead to negative congressional reaction.[305] As proof he quoted New York Times' accounts of derisive statements made by congressmen in response to judicial interpretation of NEPA.[306] The practical danger, he implied, is that the courts' overreaction in one instance might effect a condition whereby they are denied all power of review.[307]

Government by judiciary exists at the expense of a working democ-

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[300] Or perhaps, as Glazer suggests, the citizenry becomes too numb even to respond to the courts' excesses, feeling the whole matter to be beyond their control. *See* Glazer, *supra* note 24, at 69.

[301] *See* F. ANDERSON, *supra* note 67, at 112-13.

[302] *See* R. LIROFF, *supra* note 68, at 146.

[303] Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972).

[304] Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424 (codified at 42 U.S.C. § 4332(D) (1976)); *see* Shapiro and Squillace, *NEPA's First Amendment: An Erosion?*, 3 J. CONTEMP. L. 37 (1976).

[305] Environmental Defense Fund, Inc. v. Froehlke, 368 F. Supp. 231, 238 (W.D. Mo. 1973), *aff'd sub nom.* Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974).

[306] 368 F. Supp. at 239.

[307] See note 302 and accompanying text *supra.*

racy; "[a] crucial premise of popular government is that democratic decision-making procedures confer legitimacy on the results of those procedures."[308] When a court makes a decision theoretically reserved for the legislature or executive, one man or three men or nine men abrogate the will of the people and replace it with their own will. It is no answer to argue that legislators are sufficiently removed from the people to be unresponsive to their wishes. Legislators initially are chosen by the people, ultimately can be removed by the people, and in the meantime continually respond to the pressures and demands of the people; nothing akin to that relationship is present in the judiciary. Representative government, defended by the Founding Fathers for its ability to guarantee the spirit and character of democracy, becomes meaningless when judges ignore the choices of elected representatives.

In both major environmental cases decided during the past term, the Supreme Court relied extensively on the above premise. In the "snail darter" decision both the majority and dissenters espoused the value of representative democracy. Writing for the majority, Chief Justice Burger reminded that it is the "exclusive province of Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the Nation."[309] Justice Powell agreed in principle, but dissented because he believed Congress had intended something different,[310] and Justice Rehnquist also agreed, but dissented because he believed the evidence of congressional intent to be so conflicting that the Court should not enter the fray, opting instead for the controversy to be resolved by the people's representatives.[311] Writing a few weeks earlier for a unanimous Court in *Vermont Yankee,* Justice Rehnquist isolated the critical issue:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role . . . . Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.[312]

Although the "snail darter" decision pleased environmentalists and

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[308] G. WILL, THE PURSUIT OF HAPPINESS, AND OTHER SOBERING THOUGHTS 204 (1978).

[309] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

[310] *Id.* at 196 (Powell, J., dissenting) ("I cannot believe that Congress intended this Act to produce the 'absurd result' of applying § 7 to a project that is substantially completed, when a threat to an endangered species is discovered.").

[311] *Id.* at 211-13 (Rehnquist, J., dissenting).

[312] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 557-58 (1978).

Vermont Yankee angered environmentalists, both opinions should be applauded by every student of American government.

B. The Courts as Administrators

In a seminal study, Donald Horowitz carefully examined the courts' capacity for administering social policy, and persuasively concluded that courts and administrative agencies are so different in their characteristics, approach, personnel, and other features that judges are incapable of administering well.[313] And yet, judges insist on overruling school superintendents,[314] supervising prisons and hospitals,[315] and making a plethora of additional administrative decisions that affect the lives of innumerable people.

The judicial administration of NEPA is not analogous to school desegreation or prison reform by judicial decree. The environment is a tangible entity to be preserved; equality is an amorphous concept to be attained. Furthermore, environmental issues lack the constitutional mandate of equality surrounding other matters of judicial administration. Nevertheless, judges have, when applying NEPA, acted as administrators, usually by substituting their views for those of the agency. Thus, Judge Lord rejected the Forest Service's EIS because he was "*convinced* that an adequate EIS *would* show" results differing from those put forth by the agency,[316] and Judge Bazelon imposed on the Nuclear Regulatory Commission additional procedures because *he* wanted to guarantee a "thorough ventilation of the issues."[317] Not only do such decisions affect agency programs and, subsequently, the lives of citizens touched by those programs, they violate the cardinal maxim of deference to agency action—a maxim that exists for good reason.

Most importantly, the Constitution, supplemented by a history of statutory enactments, requires courts to defer to agencies. When judges exceed the statutory boundaries of NEPA by negating an agency decision, they not only contravene the intent of Congress but also encroach

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[313] D. Horowitz, *supra* note 27, at 255-83.

[314] *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). See notes 27 through 37 and accompanying text *supra.*

[315] *See, e.g.*, Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (*Bryce IV*). See notes 20 through 24 and accompanying text *supra.*

[316] Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276, 1334 (D. Minn. 1975) (emphasis added), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

[317] Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 547 F.2d 633, 644 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

upon the function of the executive branch.[318] Seeming to forget that agencies are part of the executive branch, judges must be reminded of the fundamental distribution of powers.[319]

Judges owe particular deference to agencies when cost-benefit analyses or technical valuations are debated. Judges are generalists, and they could learn from Judge Bazelon's honest admission in *International Harvester:*

> Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government's approach to these matters was statistically valid.[320]

To the contrary, Judge Bazelon's colleague, Judge Leventhal, believes that generalist judges "can penetrate the scientific explanation underlying a decision just enough to test its soundness,"[321] and, in any event, agency personnel are not environmental experts either.[322] This argument is not persuasive, however, for three reasons.

There is more than a modicum of truth in the adage that a little bit of knowledge is dangerous; that which seems amazingly simple when the understanding is superficial often is inordinately complex. It has been suggested that when Judge Wright relied on social science studies in *Hobson,* he did not really comprehend the material but relied on the secondary interpretations of the litigants.[323] Moreover, to argue that the Army Corps of Engineers, for example, is not expertly equipped to build dams and analyze their environmental impact runs counter to the purpose of the Corps. Even when agency staff members are not trained experts, they become skilled in preparing drafts, in circulating the drafts

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[318] Chief Justice Burger stated the theoretical argument this past term: "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

[319] In Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976), the court stated:

> The district court's effort to discredit the matrix approach by "second-guessing" the values assigned to specific environmental impacts was clearly improper. In the absence of a showing of arbitrariness, the values to be assigned such impacts rest within the discretion of the Forest Service, and the experts at its disposal, not the district court.

Id. at 1302.

[320] International Harvester, Inc. v. Ruckelshaus, 478 F.2d 615, 650-51 (D.C. Cir. 1973).

[321] Leventhal, *supra* note 128, at 518.

[322] *See id.* at 525.

[323] *See* D. HOROWITZ, *supra* note 27, at 134-46.

to agencies who have experts, and in placing drafts within the context of the broader program.

Judge Leventhal also errs in assuming that cost-benefit decisions produce "right" answers. He assumes that each ingredient in a program can be quantified, so that competing programs can be compared.[324] To the generalist judge, with his limited understanding of mathematics and science, quantification poses more than a few difficulties; it is a complex matter.[325] Furthermore, the quantification in monetary terms of an endangered species whose value, according to Congress, is incalculable, raises an insoluble dilemma.[326] Perhaps most importantly, "it may be beyond the powers of a 'reasonable man' to place a monetary value on the loss of ten miles of unique white water."[327] This notion implies the crucial, often ignored, point: "There is no correct result because the final conclusion is primarily a function of expert policy judgment."[328] When the Corps of Engineers chooses to build a series of dams on the Tennessee and Tombigbee Rivers, it is doubtful that any number of mathematical equations based on quantifiable alternatives could alter the decision, and that result is proper because NEPA's only mandate is that the record be complete. Judge Lord unwittingly identified the real issue when he rejected the EIS of the Forest Service because it "grossly *undervalues* virgin timber."[329] His value diverged from the values posited by the Forest Service, and indefinite cost-benefit analyses could not have changed those values. For the same reason, environmentalists incorrectly challenge agencies for assigning putatively arbitrary values to matrices and alternative programs. Of course the values may be arbitrary, but value judgments must be made, and in the instant situation,

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[324] For an outline of the process of decision-making based on quantification, see B. ACKERMAN, S. ACKERMAN, J. SAWYER, D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY (1976).

[325] As Judge Clark pointed out in Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975): "[E]very attempt to assign a dollar value to future effects of present actions necessarily involves prediction. Such opinion estimates can be most precise when the systems are simple. As they become more complex and interactive, the ability to forecast becomes more a guess and less a prediction." *Id.* at 827.

[326] The Supreme Court recognized this tension in the "snail darter" case when it declared: "Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared 'incalculable' value . . . ." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 187-88 (1978).

[327] Note, *Tilting at the Environmental Windmill—The Quest for a Substantive Right to a Clean Environment,* 9 SUFFOLK L. REV. 1286, 1302 (1974-75).

[328] Comment, *Implementing the National Environmental Policy Act Through Rulemaking: The Implications of Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission,* 126 U. PA. L. REV. 148, 194 (1977).

[329] Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276, 1312 (D. Minn. 1975) (emphasis added), *rev'd,* 541 F.2d 1292 (8th Cir. 1976).

Congress has ordered particular agencies to decide values.[330]

Judge Bazelon's effort at obviating the problems incurred by judges who act as administrators is to order more formal, complete procedures. But as Justice Rehnquist stated in *Vermont Yankee*, this remedy, too, suffers significant defects.[331] First, it puts agencies in the precarious position of never knowing which procedures are adequate until after the court has approved or disapproved. Were Judge Bazelon's approach universally adopted, agencies would need to employ full adjudicatory procedures for the making of every rule. As Judge Wright, a vocal critic of the approach, explains: "Especially in the rapidly expanding realm of economic, environmental, and energy regulation, the policy disputes are too sharp, the technological considerations too complex, the interests affected too numerous, and the missions too urgent for agencies to rely on the ponderous workings of adjudication."[332] The "ponderous workings of adjudication" ultimately would lead to administrative paralysis, and the advantages of informal procedures would be lost. Second, the approach involves second-guessing. Agencies are reviewed on evidence presented at the hearing, rather than on evidence available when the procedures were established. With rapidly developing technology and new scientific findings, agencies would continually be playing catch-up. Finally, Justice Rehnquist doubted that new procedures would "result in a more adequate record."[333] Indeed, because agency decisions depend on value judgments, "no amount of time-consuming cross-examination or discovery will produce facts when only opinions are available."[334]

Like visitors to a foreign country, judges are unprepared to serve as administrators of environmental policy. Their training does not qualify them to make technical scientific judgments, and the Constitution does not authorize them to make policy judgments. The courts' role is limited. That so many lower courts have ignored that limitation results not only from a misunderstanding of the significance of the constitutional framework, but also from an inchoate perception of politics.

C. The Courts and Politics

To many Americans politics is a dirty word. Students of the courts

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[330] The most insightful statement of this fact—indeed, one of the few law review works even to raise the point—is found in Comment, *supra* note 328, at 151-52.

[331] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549-50 (1978).

[332] Wright, *supra* note 133, at 376.

[333] 435 U.S. at 547.

[334] Comment, *supra* note 328, at 201.

advocate judicial activism because legislators are irresponsible and mired in politics. Public interest groups, like the environmentalists, gravitate to the judicial branch because they prefer the wisdom of judges to the pork barrels of congressmen, and many judges feel compelled to act when politicians are deadlocked or unresponsive. This attitude, shared by scholars and uneducated coalminers, ensues from an immature understanding of politics.

Politics is a process, an activity in which substance and result are secondary. Unlike ideology, in which the end dictates the environment, with politics the environment dictates the end. There are no "right ends," however, because politics is uncertain and imbued with conflict, change, and complexity. Hence, politics offers temporary resolutions, but can never provide final solutions. Procurement of the resolutions assumes compromise and amelioration so that backscratching, pork barreling, and similar reciprocal relationships are adopted as ways of life, and, perhaps, the only means for reconciling the competing values and interests in society. Politics is not mastered easily; the politician is an artist limited by human nature and the political environment in which he resides. Few men possess the skill to discern the level at which both most interests are satisfied sufficiently to prevent rebellion, and sufficient shared interests remain to ensure the survival of society.

Few judicial opinions evince awareness of interest in the underlying politics of environmental decisions, and even judges who revere separation of powers casually disregard the necessity of politics. Nevertheless, there are exceptions. Some judges openly distrust the political process, and perceive themselves as saving protectors of the felt needs of the citizenry. One district judge, for example, harshly reprehended the Secretary of Interior, accusing him of making a decision prior to the initiating of the NEPA process, rendering subsequent NEPA review "a 'charade' and the outcome a 'foregone conclusion.' "[335] In reversing, the reviewing court of appeals solicitously explained the complexities of govenmental decision-making in a manner worthy of quotation:

> As it is, a government policy-maker is placed by NEPA in a difficult enough posture with respect to controversial federal programs of the type under review. On the one hand, in response to public pressure to find means of satisfying our ever-increasing and widespread national energy needs, he is expected to originate and consider proposals for exploitation of our natural resources. On the other, he is obligated by NEPA to proceed with such proposals only when, in his honest judgment and after full detailed study and balancing of all relevant factors,

[335] County of Suffolk v. Secretary of Interior, 76 F.R.D. 469 (S.D.N.Y. 1976), *rev'd*, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

> he concludes that the project is worth the environmental cost. Although the task might be lightened by placing the burden of making the final decision elsewhere . . . under present law it continues to rest on the same person's shoulders, undoubtedly in part because he and his subordinates are more familiar with all of the relevant facts and circumstances than anyone else in government.[336]

Of course, judges will continue to disdain that reality; examples are Judge Lord's hostile condemnation of the Forest Service decision in *MPIRG*,[337] and Judge Wright's open disgust with bureaucrats in *Calvert Cliffs'*.[338]

A positive exception to the indifference and open hostility is District Judge John W. Oliver's opinion in *Environmental Defense Fund, Inc. v. Froehlke*.[339] It has both practical and theoretical dimensions. From the practical perspective, Judge Oliver urged that excessive intrusions by the courts would lead to congressional reaction because of disenchantment.[340] To be sure, in performing their assigned duties, courts should not be intimidated by congressional bullying, but at the same time, when courts exceed their assigned duties, they should not be surprised at political repercussions. The courts are theoretically ill-suited to resolve conflicts about building dams or saving endangered species because those controversies primarily are economic, based on personal valuation, and can be mediated only in the political arena after all forces have spoken. In giving the final go-ahead for the Jordan Dam in North Carolina, the presiding judge stated the crucial point: "[C]ertainly there are those who would prefer that this remain in its natural state, however, the needs and demands of a growing society often require the making of hard decisions for the benefit of the greater number of citizens."[341] Only politicians can faithfully make "hard decisions" that "benefit . . . the greater number of citizens."

Too often the courts are a refuge for environmentalists who have lost at politics—either because they have played poorly or some other interest has played harder. Judges frequently accuse environmentalists of obstructionism and delay tactics that are contrary to the rules of politics. One of Justice Rehnquist's charges in *Vermont Yankee* was that

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[336] 562 F.2d at 1389.

[337] *See* Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276, 1323-25 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

[338] Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1117-22 (D.C. Cir. 1971).

[339] 368 F. Supp. 231 (W.D. Mo. 1973), *aff'd sub nom.* Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974).

[340] 368 F. Supp. at 238-39.

[341] Conservation Council v. Froehlke, 435 F. Supp. 775, 796 (M.D.N.C. 1977).

one of the environmentalist litigants had not participated fully in the hearings, but had then complained that the NRC had not given full attention to all options.[342] And the NRDC, as well as the Government, switched positions frequently and "as nimbly as if dancing a quadrille."[343] The effort of environmentalists to make NEPA "a crutch for chronic faultfinding"[344] can only work to the disadvantage of the public over time.

First, as Judge Eisele stated: "The judiciary can only delay the construction."[345] Cases lag in courts for years, but environmentalists eventually lose, and until NEPA is construed differently, this fact will not change. The Jordon Dam litigation was commenced in 1971; in 1977, the district court ruled that the dam could be built.[346] The Cache River project litigation continued for four and one-half years, but it too gained judicial approval.[347] Consumer Power first applied for a construction permit in 1969 and reached the Supreme Court in 1978—the response was favorable.[348] In almost every instance, environmentalists ultimately lose, and in the meantime, costs rise. In short, to stop projects such interest groups must work through Congress and the bureaucracy. One is amazed that while environmentalists scurry to courts, congressmen appropriate money yearly for the very projects the environmentalists are contesting. If environmentalists want to stop such projects rather than delay them, they must go to the primary decision-makers.[349]

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[342] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 531-32 (1978).

[343] *Id.* at 539-40 (quoting Orloff v. Willoughby, 345 U.S. 83, 87 (1953) (footnote omitted)).

[344] Conservation Council v. Froehlke, 435 F. Supp. 775, 796 (M.D.N.C. 1977).

[345] Environmental Defense Fund, Inc. v. Corp. of Eng'rs, 342 F. Supp. 1211, 1216 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

[346] Conservation Council v. Froehlke, 435 F. Supp. 775, 797 (M.D.N.C. 1977). See note 183 and accompanying text *supra*.

[347] Environmental Defense Fund, Inc. v. Hoffman, 421 F. Supp. 1083, 1089 (E.D. Ark. 1976) (mem.), *aff'd*, 566 F.2d 1060 (8th Cir. 1977). See notes 176 through 179 and accompanying text *supra*.

[348] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

[349] To be sure, that is not as easy as it sounds. Indeed, many commentators would contend that the courts have not grabbed power, but rather have attempted to fill a vacuum created by congressional irresponsibility. Congress, they argue, is intentionally vague in its legislation, frequently deflecting to the courts or bureaucracy to avoid establishing any position that might be controversial. That they respond in such a manner should not be surprising, for we are in the midst of an era of selfish, interest-group politics. *See* M. FIORINA, CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); T. LOWI, THE END OF LIBERALISM (1969); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). But just because Congress has failed to perform its duty in the manner envisioned by the Founding Fathers is not grounds for degrading the remaining features of the constitutional

The grave danger is that environmentalists will gravitate so frequently to the courts that they will forget how to play politics. George Will writes: "Having adopted litigation as a substitute for political persuasion, 'progressives' will awaken too late to the fact that their powers of persuasion have atrophied."[350] The lesson is as old as Aristotle's teaching that one becomes good by practicing being good. To be good at politics, one must practice it regularly. In the end more is at stake than the stopping of construction of a few dams; the crucial issue is the ability of a free people to govern themselves. If free people look to nine wise men every time something seems amiss, or if they hire expensive lawyers every time they wish to dispute a political decision, they soon will forget how to fight for their own interests in the political arena. Thayer was correct in urging the courts to permit the people to have the political experience and moral education that comes from political battles. It is not easy for a government to remain free, but "it is quite wrong for the Court to relieve [the people] of this burden of self-government."[351] One can only wonder what the Founding Fathers would think of a people who prefer stopping the construction of dams to save three-inch fish to the enduring principles of self-government.

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foundation. No matter how important prevailing values may seem at the moment and no matter how dismal Congress' response may be, we must never allow ourselves to supersede the principles of separated powers and a working system of politics.

[350] G. WILL, *supra* note 308, at 204-05.

[351] A. BICKEL, THE LEAST DANGEROUS BRANCH 136 (1962).

CORPORATE FREE SPEECH AND CAMPAIGN FINANCE IN MISSISSIPPI

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Mississippi law has for many years totally prohibited contributions by corporations to candidates for elective political offices.[1] In recent years suspicion has grown, not entirely without reason, that the prohibition has been less than fully effective. Recognizing the necessity of modernizing and providing more effective enforcement of campaign laws, the Mississippi Legislature at the closing of the 1978 regular session sent to the Governor a comprehensive campaign reform bill.[2] The new law, which requires detailed reporting of contributions and expenditures,[3] also permits corporate political expenditures, which are not to exceed $1,000 for each candidate or political party in a single year.[4]

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[1] MISS. CODE ANN. § 97-13-15 (1972) (current version at MISS. CODE ANN. § 97-13-15 (Supp. 1978)).

[2] 1978 MISS. LAWS ch. 479. The purpose of this legislation is stated in its preamble:

> Whereas, the people have a right to expect from their elected representatives at all levels of government the utmost in integrity, honesty and fairness in their dealing; and
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> Whereas, the people further have a right, in order to vote knowledgeably, to true and timely disclosure of the identity of financial backers and the extent of financial support for candidates for political office; . . . .

Id.

[3] MISS. CODE ANN. §§ 23-3-41 to -43, -67 (Supp. 1978).

[4] Section 5 of Chapter 479 amended MISS. CODE ANN. § 97-13-15 (1972) to read as follows:

> It shall be unlawful for any corporation, incorporated company or incorporated association, by whatever name it may be known, incorporated or organized under the laws of this state, or doing business in this state, or for any servant, agent, employee or officer thereof, to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property of said corporation, incorporated company or incorporated association, in excess of one thousand dollars ($1,000) for the purpose of aiding any political party or any candidate for any public office, or any candidate for any nomination for any public office of any political party, or to give, donate, appropriate or furnish, directly or indirectly, any money, security, funds or property of said corporation, incorporated company or association in excess of one thousand dollars ($1,000) to any committee or person as a contribution to the expense of any political party or any candidate, representative or committee of any political party, or any committee or other person acting in behalf of such candidate. The limit of one

Upon approval by the appropriate factotum, the new law will take effect under section 5 of the Voting Rights Act of 1965.[5]

The Supreme Court of the United States, in the same year, rendered a decision which casts grave doubts on the constitutionality of the Mississippi legislature's attempt to limit corporate expenditures. In *First National Bank v. Bellotti,*[6] a narrow majority of the Court invalidated a Massachusetts statute[7] prohibiting expenditures by business corporations attempting to influence the vote on referendum proposals.[8] The Court held that the statute improperly restricted political expression in violation of the free speech clause of the first amendment as applied to the states through the fourteenth amendment.[9] The Court's reasoning was based in part upon its decision in *Buckley v. Valeo*[10] which two years earlier had held that the expenditure of money for political purposes is protected under the first amendment.

The *Bellotti* decision threatens not only the new Mississippi statute, but also similar laws in some thirty other states[11] and the Federal Corrupt Practices Act.[12] The *Bellotti* majority carefully emphasized that a different result might be reached with regard to statutes regulating the election of public officials;[13] however, *Buckley* clearly indicates that some applications of the broad Mississippi statute would be invalid as applied to natural persons,[14] and the principal dissent in *Bellotti* complained that the majority had eliminated distinctions between corporations and individuals.[15] An examination of the statutes of Mississippi and other states will illustrate the potential impact of *Buckley* and *Bellotti* on corporate political contributions. This examination should

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thousand dollars ($1,000) for contributions to political parties shall be an annual limitation applicable to each calendar year.

1978 MISS. LAWS ch. 479, § 5.

[5] 42 U.S.C. § 1973(c) (1976).

[6] 435 U.S. 765 (1978).

[7] Mass. Gen. Laws Ann. ch. 55, § 8 (West Supp. 1977).

[8] Five Justices, speaking through Justice Powell, found the statute an impermissible restriction of speech protected by the first amendment. 435 U.S. at 795. Justice White, joined by Justices Brennan and Marshall, found the statute a valid effort to forestall corruption of the political process by corporate wealth. *Id.* at 803 (White, J., dissenting). Justice Rehnquist, in his dissent, concluded that the fourteenth amendment did not grant to business corporations the right to engage in political speech. *Id.* at 822 (Rehnquist, J., dissenting).

[9] *Id.* at 776.

[10] 424 U.S. 1 (1976).

[11] See note 25 *infra.*

[12] *See* 435 U.S. at 803 & n.1 (White, J., dissenting).

[13] *Id.* at 788 n.26.

[14] See text accompanying notes 78 through 82 *infra.*

[15] 435 U.S. at 809 (White, J., dissenting).

reveal the serious, although not insurmountable difficulties facing the Mississippi statute.

I. State Regulation of Political Contributions by Corporations

On its face, the Mississippi statute appears to place comprehensive restrictions on corporate political activity. No corporation or its agent may "give, donate, appropriate, or furnish directly or indirectly, any money, security, funds or property of said corporation . . . in excess of one thousand dollars ($1,000) for the purpose of aiding any political party or any candidate for any public office, or any candidate for any nomination for any public office of any political party."[16] It was clearly the intention of the legislature to cover not only direct contributions to a candidate or a party but also all independent expenditures "for the purpose of aiding any candidate or party."[17] As will be shown, the *Buckley* decision attaches overwhelming importance to the distinction between the two types of expenditures.[18] The first type, direct contributions, may be defined broadly enough to include independent expenditures made by prearrangement with a candidate or party.[19] The second, other independent expenditures, must be defined very narrowly to avoid problems of vagueness.[20] Yet, before discussing further the application of the *Buckley* ruling to the Mississippi statute, a consideration of the statutes of other states is necessary.

Mississippi was not the first state to attempt to regulate political contributions by corporations.[21] The first act prohibiting corporate expenditures for support of political candidates or ballot issues was passed in New York in 1906, two years prior to enactment of the Mississippi statute.[22] The New York statute was enacted in response to public outcry which arose after an investigation revealed that large contributions by insurance companies had resulted in the protection of that industry by the state legislature.[23]

Since the enactment of the first Corrupt Practices Act by New

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[16] Miss. Code Ann. § 97-13-15 (Supp. 1978).

[17] *Id.* Unlike the statute at issue in *Bellotti*, *see* 435 U.S. at 1411-12 & n.2, the Mississippi statute does not restrict expenditures relating to referenda.

[18] *See* 424 U.S. at 12-59.

[19] *Id.* at 23 n.24, 46-47 & n.53.

[20] *See id.* at 40-44.

[21] 1906 N.Y. Laws ch. 839.

[22] The original Mississippi statute prohibiting corporate political expenditures was enacted in 1908. 1908 Miss. Laws ch. 724.

[23] For a discussion of the events leading to the passage of New York's Corrupt Practices Act, *see generally* Comment, *Corporate Political Affairs Program*, 70 Yale L.J. 821, 837 (1961).

York,[24] thirty-two states and the District of Columbia have passed laws that deal with corporate political contributions.[25] The manner in which the states have attempted to regulate corporate political contributions varies. Some state statutes, considered the most onerous infringement of the corporation's right to freedom of expression,[26] prohibit all political

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[24] 1906 N.Y. LAWS ch. 839.

[25] ALA. CODE tit. 17, § 22-3 (1975); ALASKA STAT. § 15.13.070 (1976); ARIZ. REV. STAT. ANN. § 16-472 (1975); ARK. STAT. ANN. § 3-1110 (Supp. 1976); CAL. ELEC. CODE § 22004 (West 1977); DEL. CODE ANN. tit. 15, § 8004 (Supp. 1978); D.C. CODE ENCYCL. § 1-1113 (West 1966); FLA. STAT. ANN. § 106.08 (West Supp. 1974-78); GA. CODE ANN. §§ 40-3801 to -3811 (1975); IOWA CODE ANN. § 56.29 (West Supp. 1978); KAN. STAT. ANN. § 25-1709 (1973); KY. REV. STAT. ANN. § 121.025 (Baldwin); LA. REV. STAT. § 1488 (West Supp. 1978); ME. REV. STAT. ANN. tit. 21, § 1395 (Supp. 1978); MD. ANN. CODE art. 33, § 26-9 (Supp. 1978); MICH. COMP. LAWS ANN. §§ 169.254-.255 (Supp. 1978-79); MINN. STAT. ANN. § 210A.34 (West Supp. 1979); MISS. CODE ANN. §19-13-15 (Supp. 1978); MONT. REV. CODE ANN. § 13-35-227 (1978); N.H. REV. STAT. ANN. § 70:2 (1970); N.J. STAT. ANN. § 19:34-32 (West 1964); N.Y. ELEC. LAW § 480 (McKinney Supp. 1977); N.C. GEN. STAT. § 163-278.15 (1976); N.D. CENT. CODE § 16-20-08 (Supp. 1977); OHIO REV. CODE ANN. § 3599.03 (Page 1972); OKLA. STAT. ANN. tit. 26, § 15-110 (West Supp. 1978-79); OR. REV. STAT. § 260.472 (1977); PA. STAT. ANN. tit. 25, §§ 3225, 3543 (Purdon 1963); S.D. COMPILED LAWS ANN. § 12-25-2 (Supp. 1978); TENN. CODE ANN. § 2-1932 (Supp. 1978); TEX. ELEC. CODE ANN. art. 14.06 (Vernon Supp. 1978); W. VA. CODE § 3-8-8 (Supp. 1978); WIS. STAT. ANN. § 12.56 (West 1967); WYO. STAT. ANN. § 22-25-102 (1977). The Louisiana statute requires approval by the board of directors of a corporation before a contribution may be made. LA. REV. STAT. § 1488 (West Supp. 1978). The California statute does not prohibit political contributions by corporations in statewide elections, but gives local political divisions the power to ban such contributions in their elections. CAL. ELEC. CODE § 22004 (West 1977).

[26] ALA. CODE tit. 17, § 22-3 (1975); ARIZ. REV. STAT. ANN. § 16-472 (1975); IOWA CODE ANN. § 56.29 (West Supp. 1978); KAN. STAT. ANN. § 25-1709 (1973); KY. REV. STAT. ANN. § 121.025 (Baldwin 1978); MINN. STAT. ANN. § 210A.34 (West Supp. 1979); MONT. REV. CODE ANN. § 13-35-227 (1978); N.H. REV. STAT. ANN. § 70:2 (1970); N.C. GEN. STAT. § 163-278.15 (1976); N.D. CENT. CODE § 16-20-08 (Supp. 1977); OHIO REV. CODE ANN. § 3599.03 (Page 1972); OKLA. STAT. ANN. tit. 26, § 15-110 (West Supp. 1978-79); PA. STAT. ANN. tit. 25, §§ 3225, 3543 (Purdon 1963); S.D. COMPILED LAWS ANN. § 12-25-2 (Supp. 1978); TENN. CODE ANN. § 32-1932 (Supp. 1978); TEX. ELEC. CODE ANN. art. 14.06 (Vernon Supp. 1978); WIS. STAT. ANN. § 12.56 (West 1967); WYO. STAT. ANN. § 22-25-102 (1977). The Alabama statute prohibiting corporate contributions is illustrative of the language used in these statutes:

> It is a corrupt practice for any person directly or indirectly by himself or through any other person to commit any of the following acts:
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> . . .
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> (6) For any corporation or person, trustee or trustees, owning or holding a majority of stock of a corporation carrying on the business of a bank, savings bank, trust, trustee, savings indemnity, safety deposit, insurance, railroad, street railway, telephone, telegraph, gas, electric light, heat or power company, or any company having the right to condemn land or to exercise franchises in public ways granted by the state, county, city or town, to pay or contribute any money or value in order to aid or promote the nomination or election of any person, or in order to aid or promote the interest or success, or defeat, of any

contributions by corporations.[27] Other states have been more lenient, merely placing limits on the amount that corporations may contribute to political campaigns.[28] Utilizing a different approach, Georgia,[29] New Jersey,[30] and Oregon[31] have adopted statutes that prohibit political contributions by certain specified corporations.[32] The corporations specified

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political party or political proposition;

(7) For any business corporation incorporated under the laws of or doing business in this state, or any officer or agent acting in behalf of such corporation, to directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing in order to aid, promote or prevent the nomination or election of any person, or defeat any question or proposition submitted to the vote of the people, or in order to aid, promote or antagonize the interest of any political party; or

(8) For any person or persons or political committee to solicit or receive from such corporations any such gift, payment, expenditure or contributions, or any promise to give, pay, expend or contribute.

ALA. CODE tit. 17, § 22-3(6)-(8) (1975). *See also* MICH. COMP. LAWS. ANN. §§ 169.254-.255 (Supp. 1978-79) (requires contributions to be made to separate segregated funds set up for political purposes; no direct contributions); W. VA. CODE § 3-8-8 (Supp. 1978) (same).

[27] *See, e.g.*, Schwartz v. Romnes, 495 F.2d 844, 852-53 (2d Cir. 1974) (New York statute prohibiting political contributions for corporate purposes would be a violation of the corporation's right to freedom of expression); Pacific Gas & Elec. Co. v. City of Berkeley, 60 Cal. App. 3d 123, 129, 131 Cal. Rptr. 350, 353 (1976) (enforcement of city ordinance prohibiting all corporate contributions for support of a ballot measure would be an abridgement of the corporation's first amendment rights). *See generally* Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

[28] ALASKA STAT. § 15.13.070 (1976) (limit of $1,000 per year contribution by corporations to candidates for political office); ME. REV. STAT. ANN. tit. 21, § 1395 (Supp. 1978) (corporation may contribute no more than $5,000 to any candidate for political office in a year; shall not make contributions to candidates in one year aggregating more than $25,000); MISS. CODE ANN. § 97-13-15 (Supp. 1978) ($1,000 limit); N.Y. ELEC. LAW § 480 (McKinney Supp. 1977) ($5,000 limit). Four states and the District of Columbia, which limit the amount natural persons may contribute, treat corporations as natural persons. ARK. STAT. ANN. § 3-1110 (Supp. 1976) ($1,000 limit); DEL. CODE ANN. tit. 15, § 8004 (Supp. 1978) ($1,000 for statewide elections; $500 limit for others); D.C. CODE ENCYCL. § 1-1113 (West 1966) ($5,000 limit); FLA. STAT. ANN. § 106.08 (West Supp. 1974-1978) ($3,000 limit to candidates for statewide office); MD. ANN. CODE art. 33, § 26-9 (Supp. 1978) ($1,000 limit).

[29] GA. CODE ANN. § 40-3808.2 (1975) (public utilities).

[30] N.J. STAT. ANN. § 19.34-32 (West 1964) (insurance companies).

[31] OR. REV. STAT. § 260.472 (1977) (covers freight and passenger carriers).

[32] The language of the Oregon statute is typical of these statutes:

Payments by or solicitations of certain businesses. (1) As used in this section, "corporation or company" means

(a) Any corporation carrying on the business of a bank, savings bank, cooperative bank, trust, trustee, surety, indemnity, safe deposit, insurance, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, water, cemetery, or crematory company.

(b) Any company engaged in business as a common carrier of freight or passen-

are those that are substantially regulated by the states, such as public utilities.[33] These statutes were apparently passed to prevent public service oriented corporations, many of which have a virtual monopoly in a certain area, from using their financial resources to influence legislation which might hinder effective regulation of their activities.

The maze of state statutes prohibiting corporations from making political contributions has done little to impede the activity of corporations in this area.[34] An examination of the cases indicates that there have been relatively few convictions under these statutes.

The leading case in which a corporation was convicted under a state corrupt practices act is *People v. Gansley*.[35] In *Gansley*, the manager of a brewery was convicted of violating the Michigan Corrupt Practices Act.[36] On appeal of the conviction,[37] the director of the corporation apparently argued that the corporation was entitled to the first amendment protection of freedom of speech via the privileges and immunities clause of the fourteenth amendment to the United States Constitution.[38] The court rejected this argument, holding that the privileges and immunities clause applies only to natural persons.[39] The court also rejected the corporation's claim that its right to freedom of expression under the state constitution[40] had been violated.[41]

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gers by railroad, motor truck, motor bus, airplane or watercraft.

(c) Any company having the right to take or condemn land or to exercise franchises in public ways granted by the state or any county or city.

(2) No corporation or company shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party or political committee supporting or opposing any person as a candidate. No person shall solicit or receive such payment or contribution from such corporation or company.

OR. REV. STAT. § 260.472 (1977).

[33] *See id.*

[34] This fact is surprising in light of the harsh penalties provided for violation of the statutes. *E.g.*, MISS. CODE ANN. § 97-13-17 (Supp. 1978) (not less than $1,000 nor more than $5,000 for corporation violating act); TENN. CODE ANN. § 2-1933 (Supp. 1978) (not less than $500 nor more than $2,000 for violation; officer or representative of corporation may be jailed for six months). Some statutes provide that violation of the statute can result in a domestic corporation's being dissolved and a foreign corporation's forfeiting its right to do business in the state. *E.g.*, FLA. STAT. ANN. § 106.08 (West Supp. 1974-78); WIS. STAT. ANN. § 12.56 (West 1967) (fines of $500 to $2,000 and imprisonment provided).

[35] People v. Gansley, 191 Mich. 357, 158 N.W. 195 (1916).

[36] 1913 MICH. PUB. ACTS No. 109, § 14.

[37] The manager of the brewing corporation was charged with contributing funds on behalf of the corporation to a political committee opposing a local option concerning county liquor laws. 191 Mich. 357, 158 N.W. at 196.

[38] 158 N.W. at 199.

[39] *Id.* at 199-200.

[40] MICH. CONST. art. 2, § 4.

[41] 158 N.W. at 201. The claim that the corporation's right to freedom of expression

While there have been other convictions under the campaign contribution statutes of the various states,[42] they are few in number when compared with those in which the corporation was found not guilty.[43] The scarcity of convictions is probably the result of the states' reluctance to enforce the laws against culpable corporations. These corporations are usually large employers in the state and provide substantial tax revenue. The fear that corporations might decide to locate elsewhere unless they are allowed to have some influence in state politics is probably an important factor in enforcement of the statutes.

In the limited enforcement of campaign contribution statutes, states have begun to draw a distinction between contributions made for the purpose of influencing the nomination and election of a candidate and contributions made to express an opinion or position concerning a ballot question.[44] In states that have dealt with this question, the courts have held that statutory provisions which prohibit expenditures to influence elections of candidates may be constitutional,[45] but that statutes

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under the state constitution had been violated was rejected on the ground that the provision of the constitution applied only to natural persons. *Id.*

[42] *E.g.*, Schiller Park Colonial Inn, Inc. v. Berz, 63 Ill. 2d 499, 349 N.E. 2d 61, 67 (1976) (state statute prohibiting liquor licensees from making any direct or indirect contribution to a political party or candidate upheld against claims of freedom of speech and association infringement by corporation); State v. Fairbanks, 187 Ind. 248, 115 N.E. 769, 770-71 (1917) (brewing corporation convicted of violating law against corporate contributions to political candidates; no indication that corporation made right to freedom of expression argument).

[43] *E.g.*, Schwartz v. Romnes, 495 F.2d 844, 852-53 (2d Cir. 1974) (corporations are guaranteed freedom of expression for the purpose of making political contributions and expenditures for ballot measures); Pacific Gas & Elec. Co. v. City of Berkeley, 60 Cal. App. 3d 123, 129, 131 Cal. Rptr. 350, 353 (1976) (city ordinance prohibiting corporate contributions or expenditures for the support of or opposition to ballot measures held an abridgement of electric corporation's right to freedom of expression). Many courts have failed to deal with the question of infringement of freedom of speech and have preferred to find the corporation not guilty on other grounds. *E.g.*, Hatcher v. Petry, 261 Ky. 52, 86 S.W.2d 1043, 1045 (1935) (no evidence that miner's union was a corporation); La Belle v. Hennepin County Bar Ass'n, 206 Minn. 290, 288 N.W. 788, 792 (1939) (advisory ballot expense held not a payment or contribution); State v. Joe Must Go Club, 270 Wis. 108, 70 N.W.2d 681, 684 (1955) (no evidence that defendant was doing business within language of the statute).

[44] Some states make the distinction in their statutes. *E.g.*, MD. ANN. CODE art. 33, § 26-9 (Supp. 1978) (limited contributions to political candidates and issues); MONT. REV. CODE ANN. § 13-35-227 (1978) (prohibiting contributions by corporations to political candidates or in support of or opposition to referenda); TENN. CODE ANN. § 2-1932 (Supp. 1978) (same). *Contra*, MISS. CODE ANN. § 97-13-15 (Supp. 1978) (no distinction in statute between contributions to candidates and contributions in support of or opposition to political issues).

[45] This reasoning is based on the premise set out in Buckley v. Valeo, 424 U.S. 1, 17-19 (1976), that expenditures for communication of opinions concerning public issues are constitutionally protected.

which prohibit corporate contributions for influencing ballot questions are unconstitutonal.[46]

The Michigan Supreme Court dealt with this question in *Advisory Opinion on Constitutionality of 1975 P.A.227*,[47] responding to a request for an advisory opinion on the constitutionality of a political reform act[48] that limited expenditures by corporations for political ballot questions and candidates.[49] The court stated that expenditures or contributions to communicate views and opinions about public issues are constitutionally protected.[50] This form of communication, the court reasoned, serves to inform the public and does not create the peril that elected officials will incur obligations to contributors.[51] The court held that a corporation has a right to a forum to express its position on ballot questions;[52] therefore, the provision was violative of the state constitution's guarantee of free speech.[53]

It is apparent that state statutes which attempt to restrict corporate political contributions are fraught with problems. The infringement on the corporation's right to freedom of expression on ballot questions is intolerable. Recognizing this fact, many states have sought to overcome these problems by writing new statues,[54] by narrowly interpreting the

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[46] Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974), is a leading case in this area. In construing the New York statute, the court stated:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights. Against a background on such attenuated danger we decline here . . . to ascribe to the legislators an intention to regulate, perchance prohibit, the expression of opinion on fundamental issues of the day.

Id. at 852-53.

[47] 396 Mich. 465, 242 N.W.2d 3 (1976).

[48] 1975 MICH. PUB. ACTS No. 227, ch. 2.

[49] 396 Mich. 465, 242 N.W.2d at 12.

[50] 242 N.W.2d at 13.

[51] *Id.* at 14-15.

[52] *Id.* The court based its opinion on the reasoning of the United States Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), where, although the Court did not deal with an express statutory provision prohibiting corporate contributions, it held that limits on expenditures as opposed to contributions was violative of the first amendment. *Id.* at 19-22.

[53] 396 Mich. 465, 242 N.W.2d 3, 15 (1976). *See also* Schwartz v. Romnes, 495 F.2d 844, 852-53 (2d Cir. 1974), in which an identical conclusion was reached by the Second Circuit.

[54] *See, e.g.*, MINN. STAT. ANN. § 210A.34 (West Supp. 1979) (new campaign contribution statute prohibits contributions to candidates, but allows contributions or expenditures in support of or opposition to ballot questions).

statutes,[55] or by repealing the restrictive statutes altogether.[56]

As will be discussed later in this Article, a substantial narrowing of the Mississippi statute appears inevitable in view of the trend toward recognizing the corporation's right to freedom of expression. The steps that other states have taken to bring their campaign contribution statutes in line with the holdings in *Buckely v. Valeo*[57] and *Bellotti v. First National Bank*[58] should be helpful to Mississippi in narrowing its statute.

II. The Constitutional Status of Corporate Political Speech

It is interesting to note that the Supreme Court, prior to *Bellotti*, had never been squarely confronted with the issue of corporate political free speech. The novelty of this issue is surprising since laws restricting corporate campaign contributions have been in existence for decades[59] and since the free speech clause of the first amendment has been applied against the states since early in this century.[60] Nevertheless, as recently as 1939, the Court held that the American Civil Liberties Union was not entitled to constitutionally protected freedom of expression.[61]

In recent years the Court has been concerned more with defining the boundaries of protected speech than with determining the speakers to which the protection applies. In 1963, in *NAACP v. Button*,[62] the Court first held that litigation could be a form of protected expression. Subsequent cases dealt with the constitutional status of activities ranging from draft card burning[63] to nude dancing.[64] Also during the last few

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[55] See notes 30 and 31 *supra*. *See also* Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974).

[56] *See, e.g.*, La. Rev. Stat. 18:1482 (West Supp. 1979) (amended and reenacted 1975) (prohibited all corporate contributions); Mo. Rev. Stat. Ann. § 129.070 (1966) (repealed 1978) (same).

[57] 424 U.S. 1 (1976).

[58] 435 U.S. 765 (1978). A more extensive discussion of *Buckley* and *Bellotti* and the necessity for a narrow judicial interpretation of the Mississippi statute may be found at notes 66 through 113 and accompanying text *infra*.

[59] See notes 21 through 43 and accompanying text *supra*.

[60] *See* Stromberg v. California, 283 U.S. 359, 368 (1931); *cf.* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[61] Hague v. C.I.O., 307 U.S. 496, 514 (1939) (opinion of Roberts, J.); *id.* at 527 (opinion of Stone, J.). *Hague* was substantially undermined by NAACP v. Button, 371 U.S. 415 (1963), which held that the NAACP, a corporation, had standing to "assert this right protected by the First Amendment on its own behalf." *Id.* at 428. Interestingly enough, Justice Brennan's opinion for the Court in *Button* did not even mention the *Hague* decision.

[62] 371 U.S. 415 (1963).

[63] *See* United States v. O'Brien, 391 U.S. 367 (1968).

[64] *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972).

years, the Court has abandoned the doctrine that commercial speech is beyond the pale of the first amendment and subjected restrictions on professional advertising to exacting review.[65] It was not until 1976, however, that the Court decided, in *Buckley v. Valeo*, that the expenditure of money for political purposes constituted protected speech rather than mere conduct.[66] Not all observers found that proposition self-evident,[67] but the Court, after a lengthy discussion, neatly disposed of their arguments in a single sentence: "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[68] In *Buckley*, the Court again focused on the character of the speech rather than of the speaker. The federal statute in question prohibited corporate contributions altogether,[69] but that question was apparently not presented in *Buckley*.

When the issue of corporate political activity was finally raised in *Bellotti*, a slim majority of the Court continued to give primary consideration to the nature of the speech.[70] The Court explicitly refused to inquire whether corporations have first amendment rights. It chose in-

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[65] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1975); Bigelow v. Virginia, 421 U.S. 809 (1975). The exclusion of commercial speech from the protection of the first amendment had been established by Valentine v. Chrestensen, 316 U.S. 52 (1942). That commercial speech is still entitled to significantly less protection than speech characterized as political is demonstrated by comparing *Ohralik*, 436 U.S. at 455-56, with *In re* Primus, 436 U.S. 412 (1978).

[66] 424 U.S. at 16.

[67] *See, e.g.*, Buckley v. Valeo, 519 F.2d 821, 840 (D.C. Cir. 1975) (when speech and nonspeech elements were both present, high government interest in the election justified regulating the nonspeech element), *rev'd*, 424 U.S. 1 (1976).

[68] 424 U.S. at 19 n.18.

[69] 18 U.S.C. § 610 (1970, Supp. IV 1974), *repealed by* Act of May 11, 1976, Pub. L. No. 94-283, tit. II, § 201(a), 90 Stat. 496. *See also* 424 U.S. at 28 n.31. A new statute to the same effect appears at 2 U.S.C. § 441b (1976).

[70] The content of the speech in question has become increasingly important to the Court's deliberations. As *Bellotti* shows, it is extremely difficult to restrict speech characterized as political. *See also In re* Primus, 436 U.S. 412 (1978). Commercial speech, however, is entitled to significantly less protection. *See generally* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). In addition, Justice Stevens, joined by Justices Stewart and Rehnquist, has concluded that "a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its context," even though it is not obscene. FCC v. Pacifica Foundation, 98 S. Ct. 3026, 3038 (1978) (opinion of Stevens, J.). Justices Powell and Blackmun denied that content could generally be taken into consideration, while conceding the legitimacy of the practice in the case of commercial speech. *Id.* at 3046 & n.3 (Powell, J., concurring). Justice Stevens maintained that, despite their disclaimer, the two concurring Justices had indeed considered content "by concurring in a judgment that could not otherwise stand." *Id.* at 3038 n.20.

stead to determine "whether § 8 [of the Massachusetts statute] abridges expression that the first amendment was meant to protect."[71] Such an approach was deemed necessary to advance "significant societal interests,"[72] including that of the public to hear and consider political speech, which the Court found subsumed in the free speech clause.[73] The Court began with the presumption that political speech, from whatever source, is protected unless the state can advance sufficient justification for its abridgement. "The question in this case, simply put," wrote Justice Powell for the Court, "is whether the corporate identity of the speaker deprives this proposed speech of what would otherwise be its clear entitlement to protection."[74]

Thus, in light of *Bellotti,* any defense of the new Mississippi statute must first overcome the presumption that speech properly characterized as political is entitled to protection. Since there can be no doubt that speech "for the purpose of aiding any political party or any candidate for any public office, or any candidate for any nomination for any public office of any political party"[75] is political, the statute must fall as violative of the first amendment unless sufficiently important state interests can be advanced to support it. Should that test be safely passed, the statute must then survive challenge under the equal protection clause of the fourteenth amendment since it singles out corporate speakers for restriction. Each of these challenges will be considered in the following sections.

III. The Statutes and the First Amendment

The Mississippi statute has two separate effects. First, it limits the amount that a corporation may give "directly" to any candidate or political party by way of contribution. Second, it limits expenditures

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[71] 435 U.S. at 776. This approach, while sufficient to judge the facial validity of a statute, would prove inadequate in other contexts. For example, affected corporations might try to bring an action for damages under 42 U.S.C. § 1983 (1976), if Massachusetts officials continued to enforce the statute despite the declaration of its invalidity. In that case, the *Bellotti* Court's focus on the protected status of the speech would do little to determine whether a corporation has a personal right, protected by the Constitution, which may be redressed in damages. Surely, any *jus tertii* standing which a corporation may have to adjudicate the rights of its hearers should not allow it to collect compensation due only to them.

[72] 435 U.S. at 776.

[73] *Id.* at 777 n.12.

[74] *Id.* at 778. By the same token, the Court might inquire whether the incarcerated status of a speaker deprives political speech "of what would otherwise be its clear entitlement to protection." Of course, the Court has so far declined to rule that prisoners enjoy the right of free speech. *See* Procunier v. Navarette, 434 U.S. 555, 562-66 (1978).

[75] Miss. Code Ann. § 97-13-15 (Supp. 1978).

made "indirectly" by way of independent action on behalf of a candidate or party. *Buckley* treats these two aspects, also present in the federal statute, quite differently.

In regard to direct contributions, the *Buckley* Court concluded that limitations on political expression "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[76] The $1,000 contribution limitation in the federal statute was found necessary "to limit the actuality and appearance of corruption resulting from large individual financial contributions."[77] Obviously, such concerns are as valid in relation to Mississippi law as to federal law. If, as the Court found in *Buckley,* the state interest is compelling enough to sustain the limitation even where natural persons are involved, it follows that, absent a valid equal protection objection, the restrictions may be applied to corporations alone.[78]

As to independent expenditures, however, the Court in *Buckley* invalidated the $1,000 limitation.[79] In so doing, the Court addressed the problem of vagueness before reaching the first amendment question. Because the federal law, like the Mississippi statute, provides criminal sanctions for its violation, the Court felt compelled to construe the restriction on indirect expenditures very narrowly: "[I]n order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[80] A similar narrowing construction to save the Mississippi statute would have to include a provision prohibiting only unambiguous expressions of support or hostility to a clearly identified political party.

Turning to the first amendment question, the *Buckley* Court found the potential for corruption arising from independent expenditures to be significantly less than in the case of direct contributions. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be

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[76] 424 U.S. at 25.

[77] *Id.* at 26. It should be noted here that "expenditures controlled by or coordinated with the candidate and his campaign" were included as contributions, rather than independent expenditures, under the federal statute. *Id.* at 46. Such coordinated expenditures are clearly covered by the broad language of the Mississippi statute and could be validly prohibited.

[78] The Court intimated in *Bellotti* that corporate speech might be restricted in cases where speech by individuals could not be. 435 U.S. at 777 & n.13.

[79] 424 U.S. at 54.

[80] *Id.* at 44.

given as a *quid pro quo* for improper commitments from the candidate."[81] At the same time, the limited scope of the provision involving independent expenditures, necessary to withstand the vagueness challenge, left persons free to spend unlimited sums in a candidate's behalf so long as his election was not explicitly urged. Consequently, the Court found that no substantial societal interest would be served by a provision "designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office."[82] Based on this reasoning, the *Buckley* Court invalidated the restrictions on independent expenditures by natural persons.

The question, then, in regard to independent expenditures, is whether this form of speech, otherwise protected, may be restricted because of its corporate source. The question is apparently open, since the section prohibiting corporate expenditures was not directly considered by the Court in *Buckley*. Indeed, in *Bellotti*, the Court explicitly reserved the question: "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[83]

It is possible that the Mississsippi legislature could demonstrate such a danger. At first glance, it would seem that any independent expenditure would buy the same amount of influence, regardless of its source. However, many corporations are by their very nature in a position to offer more than mere financial assistance to the candidates of their choice. It may reasonably be feared that corporate management is in a position to exert pressure upon its employees to lend their support to chosen politicians. It is true that some wealthy individuals wield a similar power, while many small corporations do not, but it cannot be denied that the average corporation will find more available avenues of influence than will the average individual. The legislature could plausibly conclude that to permit unrestricted corporate expenditures as well would permit an intolerable risk of corruption.

There remains the objection raised in *Buckley* that the protection provided by the statute is insufficient to justify the restriction, in view of the corporation's freedom to spend so long as the election or defeat

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[81] *Id.* at 47.

[82] *Id.* at 45. The Court also rejected the argument that the government has a cognizable interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections," calling such a theory "wholly foreign to the First Amendment." *Id.* at 48-49. A similar argument was likewise repudiated in *Bellotti*. 435 U.S. at 789-92.

[83] 435 U.S. at 788 n.26. Three of the dissenters in *Bellotti* believed that Massachusetts had made a sufficient showing of such danger that the statute considered there should have been upheld. *Id.* at 821 (White, J., dissenting).

of a particular candidate is not explicitly advocated. It can be argued, in favor of invalidating the provision, that corporations will use this loophole to prevent enforcement of the provision. Yet, other protections provided by the statute are even more difficult to enforce in the case of corporations. Assuming the Mississippi prohibition against direct contributions is interpreted to include, like the federal statute, independent expenditures coordinated with a candidate, corporations with their numerous agents and employees could find innumerable devices to conceal such coordination. In short, corporations will find it easier to evade any restriction than will private individuals. A broad range of restrictions must be imposed by the law before any real hope of controlling the aggregate influence of corporate expenditures can be entertained. Thus, the restrictions found generally invalid in *Buckley* might be upheld when aimed at a more narrow class of speakers.[84]

Such a result, of course, is hardly a foregone conclusion. Although *Bellotti* explicitly suggested that such restrictions on corporate activity might be valid, it reaffirmed the standard that "the State must employ means 'closely drawn to avoid unnecessary abridgement.' "[85] Undeniably, the restrictions on independent corporate expenditures will silence much speech that would have no corrupting effect, but that is also true, in some degree, of the restrictions on contributions upheld in *Buckley*. The argument in support of the statute must be that the danger of illicit corporate influence is so great that the abridgement of valued speech is a necessary concomitant of any effective effort to forestall corruption.

IV. The Statute and the Fourteenth Amendment

The statute's isolation of a single class of speakers, which is necessary if its independent expenditure provisions are to survive *Buckley*, raises inevitable equal protection problems. Justice White's dissent in *Bellotti* lamented that the Court had ruled that "corporate contributions to and expenditures on behalf of political candidates may be no more limited than those of individuals."[86] The Court expressly disavowed such an intention,[87] but it gave no hint of the reasoning which could support a distinction between corporations and natural persons. Even if the greater resources available to corporations can justify the restrictions, the question remains whether the statute should fall for

[84] It might also be argued that the restriction is valid as a protection of stockholders against misuse of their investment. However, the Court rejected this argument in *Bellotti*, finding other remedies sufficient for the task. *Id.* at 794-95.

[85] *Id.* at 786 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

[86] 435 U.S. at 821 (White, J., dissenting).

[87] *Id.* at 777 n.13.

failure to apply the same restrictions to other similarly powerful organizations, particularly labor unions.

Corporations are clearly entitled to protection as persons under the equal protection clause.[88] Whether the Mississippi statute's imposition of special burdens upon corporations violates that provision depends largely upon the level of judicial scrutiny applied by the reviewing court. The traditional standard of restrained review requires only that a classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[89] On the other hand, a statute that utilizes a suspect classification or infringes upon a fundamental interest must serve a compelling state interest to survive "strict scrutiny."[90] Additionally, the Court has begun to impose an intermediate standard of review, especially in cases involving sex discrimination[91] or illegitimacy.[92] In such cases, a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."[93]

Should the traditional standard be employed, the Mississippi statute would clearly pass constitutional muster. It has already been demonstrated that the legislature might reasonably conclude that corporations, having more means of influence than natural persons, would pose an inordinate danger of corruption if allowed to spend freely in connection with elections. While other organizations, such as unions, might

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[88] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886).

[89] Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Under that standard, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S 420, 426 (1961).

[90] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17-44 (1973); Shapiro v. Thompson, 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting). *See also* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

[91] *See, e.g.*, Califano v. Webster, 430 U.S. 313, 316-17 (1977) (distinction of the sexes in the computation of old-age benefits does not violate equal protection); Craig v. Boren, 429 U.S. 190, 197 (1976) (gender based distinction in minimum age requirements for purchase of beer violates equal protection).

[92] Lalli v. Lalli, 99 S. Ct. 518, 523 (1978); Trimble v. Gordon, 430 U.S. 762, 766-67 nn.11-12 (1977).

[93] Craig v. Boren, 429 U.S. 190, 197 (1976). Four members of the Court recently concluded that such a standard should be employed in analyzing statutes discriminating in favor of minority races. Regents of the Univ. of California v. Bakke, 98 S. Ct. 2733, 2783-84 (1978) (opinion of Brennan, White, Marshall, & Blackmun, J.J.). *See also* Zablocki v. Redhail, 434 U.S. 425 (1978) (Powell, J., concurring). This sort of "means scrutiny" was forcefully advocated in Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). For a more critical view of subsequent developments, see Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945, 950-54 (1975).

also be more powerful than individuals, the legislature could conclude that they do not yet pose as grave a threat. Under the restrained standard of review, "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[94]

It seems unlikely that strict scrutiny, which results almost invariably in the invalidation of the statute in question,[95] should be utilized. It can hardly be contended that corporations constitute a suspect classification. The courts ordinarily reserve that appellation for "discrete and insular minorities" who may be unable to protect themselves in the political sphere.[96] Whatever one may think of the legislature's conclusion that corporations have too much power, it can hardly be maintained that they have too little to protect themselves from truly invidious legislation.

It is unclear whether freedom of speech protected by the first amendment is a fundamental interest for equal protection purposes. In *Williams v. Rhodes*[97] the Court used the equal protection clause to strike down Ohio's restrictive ballot access laws, requiring demonstration of a compelling interest when the state seeks "to place such unequal burdens on minority groups where rights of this kind are at stake."[98] However, in *Buckley* the Court upheld a federal subsidy to the two major political parties, despite significant barriers to minor-party participation.[99] Making no mention of strict scrutiny, the Court appeared to apply an inter-

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[94] Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

[95] The "compelling state interest," the Abominable Snowman of constitutional jurisprudence, has been sighted only twice. In Roe v. Wade, 410 U.S. 113, 163-64 (1973), the Court observed in dictum that states would have a compelling interest in regulating abortion during the second trimester of pregnancy and in prohibiting it during the third trimester. *See also* Planned Parenthood v. Danforth, 428 U.S. 52, 75-79 (1976). Most recently, Justice Powell has concluded that diversity of student body, of all things, is a compelling state interest. Regents of the Univ. of California v. Bakke, 98 S. Ct. 2733, 2760-61 (1978) (opinion of Powell, J.). Justice Powell did not entirely explain why diversity of student body is a more highly prized constitutional value than homogeneity.

[96] United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1936). In rejecting the contention that conscientious objectors should be designated a suspect classification, the Court recently explained the relevant considerations:

> [W]e find the traditional indicia of suspectedness lacking in this case. The class does not possess an "immutable characteristic determined solely by the accident of birth," nor is the class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (citations omitted).

[97] 393 U.S. 23 (1968).

[98] *Id.* at 31.

[99] 424 U.S. at 99.

mediate standard.[100] Only once, outside the election context,[101] has the equal protection clause been used to strike down a law with first amendment overtones and there "the discrimination among pickets [was] based on the content of their expression."[102] That infirmity is absent from the Mississippi statute, which restricts all corporate political speech regardless of its content. Indeed, if the statute does not violate the first amendment, as discussed in the previous section, it appears that no fundamental interest requiring strict scrutiny is implicated.[103]

Despite the absence of a suspect class or a fundamental interest, *Buckley* strongly suggests that an intermediate standard may be imposed in reviewing statutes similar to Mississippi's. In an earlier case involving a statute regulating elections, the Court stated: "Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve their legitimate objectives."[104] Intermediate analysis abhors rough approximations; to pass muster, a statute must be carefully tuned to alternative considerations.[105] Furthermore, the Court will consider only those objectives it believes the legislature had in mind and will not manufacture objectives in an attempt to save the statute.[106]

Fortunately, the preamble to the new enactment clearly identifies its purpose.[107] Of course, the state interest in an informed electorate can be satisfied by mere disclosure without limiting expenditures; thus, the limitation provisions are not substantially related to the achievement[108] of that objective. It remains to be seen whether the statute advances the

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[100] *See id.* at 93-96.

[101] The right to vote appears to be a fundamental interest, even though it is not explicitly guaranteed in the Constitution. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74, 35 n.76 (1973). Of course, most of the rights routinely characterized as fundamental are notoriously absent from the text of the Constitution. *Compare* Moore v. City of East Cleveland, 431 U.S. 494, 503 & n.11 (1977) (opinion of Powell, J.), *with id.* at 547-50 (White, J., dissenting).

[102] Police Dep't v. Mosley, 408 U.S. 92, 102 (1972).

[103] The Court reached exactly that conclusion in Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974): "Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test."

[104] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[105] Mathews v. Lucas, 427 U.S. 495, 513 (1976).

[106] *Compare* Trimble v. Gordon, 430 U.S. 762, 774-76 (1977) *with* Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949); *cf.* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

[107] See note 2 *supra.*

[108] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (gender classification must serve important governmental objectives and be substantially related to achieving them).

other asserted interest, the assurance of integrity, honesty, and fairness among elected officials.

There is no need to repeat the earlier argument that corporations pose a substantially greater threat to electoral integrity than do natural persons.[109] Although some closely-held corporations do not have armies of agents to do their bidding, they all enjoy the advantages of limited liability and perpetual life. This fact would seem sufficient to avoid a finding of fatal overinclusiveness.

However, a substantial argument can be made that the statute is impermissibly underinclusive. By excluding other organizations that exercise similar power, the statute is less than carefully tuned to the achievement of its objective. Just as corporations can exert extensive influence through employees and stockholders, labor unions can take action through their employees and members. Indeed, in *Bellotti*, the Court recognized these similarities in pointing out that restrictions might be sustained as to "corporations, unions, or like entities."[110]

In support of the statute, it can be argued that, in Mississippi, unions do not enjoy the same level of influence as in the rest of the country. The chief source of union strength, the closed shop, is prohibited not only by statute[111] but by the state constitution itself.[112] Thus, unions in Mississippi do not pose as grave a threat to electoral integrity as do corporations. An empirical investigation of that proposition is beyond the scope of this Article; however, it may well be that a reviewing court, applying intermediate analysis, would disagree, concluding that no substantial difference with regard to political influence exists between corporations and unions. In that case, the statute's failure to restrict the expenditures of unions would deny to corporations the equal protection of the laws.

Such a result would be extremely ironic. No one can deny that the legislature's effort to promote electoral integrity is basically reasonable and beneficial. It can hardly be argued that the statute erects an "invidiously discriminatory" barrier of the kind with which the equal protection clause is chiefly concerned.[113] The statute's possible infirmity would result solely from a peculiarly exacting mode of constitutional analysis which penalizes legislative intentions for not being good enough. Traditional equal protection analysis recognizes the truth of

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[109] See text accompanying notes 83-85 *supra*. Indeed, if that argument is not accepted, the statute falls as a violation of the first amendment without ever reaching the equal protection issue.

[110] 435 U.S. at 777 n.13.

[111] MISS. CODE ANN. § 71-1-47 (1972).

[112] MISS. CONST. art. 7, § 198-A.

[113] *See* Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (Stewart, J., concurring).

Bismarck's aphorism that one could never properly appreciate legislation or sausage having once seen it manufactured. Statutory imperfections may result from simple oversight or, especially in the case of comprehensive legislation as is involved here, from political compromises necessary to obtain any action at all. Of course, the legislature may, and probably should, avoid the problem by amending the statute to include unions within its prohibitions. Until then, the statute is in danger of invalidation on grounds of being insufficiently inclusive.

Conclusion

The Mississippi corporate campaign contribution statute gives corporations the right to express themselves in the political arena. This expression is limited by the restrictions placed on direct and indirect contributions and expenditures. The limitation on direct contributions is justified by the desire to avoid illicit corporate influence over political officials. The provision dealing with indirect expenditures, however, faces vagueness and first amendment overbreadth problems. To preserve the statute against invalidation, a substantial judicial narrowing will be required.

The statute may also be confronted with an equal protection challenge since it limits contributions and expenditures by corporations but does not place any restrictions on similar classes such as labor unions or political committees. While the success of any such challenge to this statute will depend on the level of scrutiny applied by the reviewing court, the legislature should avoid the problem by amending the statute to include labor unions and similar organizations.

The statute represents an attempt by the Mississippi legislature to recognize the corporate right to free speech and at the same time protect the societal interest in honesty and integrity among elected officials. Judges, who may dissect and examine legislation at their leisure, should take these laudable goals into consideration when reviewing the imperfections of the statute and should not allow simple legislative oversight or political compromise to defeat good legislative intentions. In short, the courts should not expect sausage-makers to act with the precision of surgeons.

PROTECTED CONCERTED ACTIVITY IN THE NON-UNION CONTEXT: LIMITATIONS ON THE EMPLOYER'S RIGHTS TO DISCIPLINE OR DISCHARGE EMPLOYEES

*Judith J. Johnson**

The fundamental purpose behind passage of the National Labor Relations Act[1] was to promote the peaceful settlement of labor disputes by providing legal remedies for the invasion of certain rights of employees.

> The purpose of the Act was not to guarantee to employees the right to do as they please but to guarantee them the right of collective bargaining for the purpose of preserving industrial peace. The policy of the Act is thus set forth, 29 U.S.C.A. sec. 151; "the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the effect of burdening or obstructing commerce."[2]

Inherent in this statement of purpose is the idea that the Act was designed to counterbalance the employer's powerful bargaining position by allowing employees the use of economic pressure to improve working conditions both with and without the mediation of a union.[3] Therefore, in addition to providing the fundamental safeguards for employees' rights to organize labor unions and to bargain collectively, the Act confers important rights on employees not engaged in union activities or organization. Section 7 of the Act guarantees the rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or

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[1] 29 U.S.C. §§ 151-87 (1976).

[2] NLRB v. Draper Corp., 145 F.2d 199, 203 (4th Cir. 1944). For a brief discussion of the purposes of and justifications for the Act see C. BUFFORD, THE WAGNER ACT—EMPLOYEE AND EMPLOYER RELATIONS §§ 3-4 (1941).

[3] *See* Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1195-97 (1969); Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 COLUM. L. REV. 514, 514-15, 526 (1953).

other mutual aid or protection . . . ."[4] The relevant portion of this section in the non-union context is the right to engage in "concerted activities" for "mutual aid or protection."[5]

Section 7 protects employees' rights by providing that employer interference, restraint, or coercion of employees in the exercise of their rights is an unfair labor practice under section 8(a)(1).[6] Section 10(c) empowers the National Labor Relations Board to order any affirmative action that effectuates the purpose of the Act, including reinstatement with or without back pay, as a remedy for the commission of an unfair labor practice.[7] By recognizing in section 10(c) that employees may be discharged for "cause,"[8] the Act also preserves the employer's common law right, subject to the limitations of statute and contract, to discharge an employee at will. In the absence of a union contract, the statutory

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[4] 29 U.S.C. § 157 (1976).

[5] Concerted activity has been defined as referring "both to employees' actions and the legal status of those actions, and as a result the term 'protected concerted activity' has been uilized to indicate such activity which is protected by law from employer's interference." 27 VAND. L. REV. 201, 202 n.8 (1974). Indeed, some writers suggest that the legal definition of concerted activity could be better conveyed by the term "protected activity" since the actual concert among employees has no significance unless it is in furtherance of some objective viewed by both the Board and the courts as valid. Note, *Concerted Activity Under Section 7 of the National Labor Relations Act*, 1955 U. ILL. L.F. 129, 130 (1955).

[6] 29 U.S.C. § 158(a)(1) (1976). Section 8 sets out specific unfair labor practices of employers in addition to the general prohibition of § 8(a)(1). These include: domination or interference with the development of labor organizations; giving financial or any other support; discriminating in the hiring or treatment of employees to affect membership of labor organizations; discharging or discriminating against an employee for filing charges or testifying under § 8; and, refusing to bargain collectively. *See* 29 U.S.C. § 158(a)(2)-(5) (1976).

[7] 29 U.S.C. § 160(c) (1976). *See generally* NLRB v. Dodson's Market, Inc., 553 F.2d 617, 620 (9th Cir. 1977) (back pay order supports public policy of Act); NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 478-79 (2d Cir. 1976) (back pay order is to reimburse actual losses of wages and deter future violations); Marriott Corp. v. NLRB, 491 F.2d 367, 371 (9th Cir. 1974) (back pay orders allowed only to mitigate damages and prevent further violations); NLRB v. Waukesha Lime & Stone Co., 343 F.2d 504, 509-10 (7th Cir. 1965) (discriminatory refusal to rehire not requisite for reinstatement); NLRB v. Ellis & Watts Prod., Inc., 297 F.2d 576, 577 (6th Cir. 1962) (reinstatement and back pay is remedial relief, not a fine or penalty). It should be noted that reinstatement and back pay are merely types of relief that may be appropriate and do not limit the remedial power of the NLRB. NLRB v. Waumbec, 114 F.2d 226, 235 (1st Cir. 1940). Indeed, reinstatement and awarding back pay are sanctions in addition to the NLRB's general power to issue orders to cease and desist against the party engaging in unfair labor practices. 29 U.S.C. § 160(c) (1976).

[8] 29 U.S.C. § 160(c) (1976); *see* NLRB v. Hartmann Luggage Co., 453 F.2d 178, 181-82 (6th Cir. 1971) (reinstatement not allowed if refusal to rehire is based on legitimate and substantial business reasons).

limitation on the employer's right to discipline or discharge an employee remains because "[t]he mantle of protection of concerted activities . . . extends to both union and non-union employees."[10]

To the extent possible, this Article will be devoted to the situation in which there is no union or union organizational activity. It should be recognized that since the National Labor Relations Act does not distinguish between the statutory rights of union and non-union employees, many of the cases involving the protected concerted activities of union members are persuasive, if not binding, authority in the non-union context. The limitations placed by the Act on employers' rights will be delineated by an examination of the four factors upon which the courts have placed emphasis—definition of the term "concerted," proper purposes of concerted activity, the type of concerted activity involved, and the ways that a protected activity may lose its protection.

I. Defining The Term "Concerted"

"[F]or employee activity to be protected under the Act, the activity must not only have a lawful objective and be carried out by lawful and proper means, but it must also be 'concerted'."[11] Employees' actions in the nature of individual complaints are not concerted and are therefore not protected.[12] For example, an employee who sought sympathy from other employees for his opposition to the employer's dress code was discharged for disrupting the workforce.[13] The Board, ruling that such activities are purely personal rather than concerted, upheld the discharge.[14] Similarly, one employee's circulation of a petition demanding the discharge of his foreman was held not to be concerted activity[15] since

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[9] *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (discharge upheld since not violative of any statute and employee was not covered under a union contract). *See generally* Annot., 83 A.L.R.2d 532 (1962) (setting out limitations on discharge of employees).

[10] Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970); *see* Trustees of Boston Univ. v. NLRB, 548 F.2d 391, 392 n.1 (1st Cir. 1977) (nonunionized employees entitled to protection of NLRA); NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (section 7 of NLRA protects employees with no bargaining representative).

[11] NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1082 (8th Cir. 1977).

[12] *See* NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 718-19 (5th Cir. 1973) (not concerted activity when individual bargained over his own contract provisions); Southwest Latex Corp. v. NLRB, 426 F.2d 50, 56-57 (5th Cir. 1970) (upheld discharge of an employee who classified his gripes as his own).

[13] Midland Frame Div., 216 N.L.R.B. 302, 306 (1975).

[14] *Id.* at 305.

[15] Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 753-54 (4th Cir. 1949). The court noted that the employees signed the petition "without thought of mutual aid or protection, and with no purpose other than to help [the discharged employee] get rid of an

the petition was merely an extension of a personal quarrel the employee had had with the foreman.[16] Therefore, if a protest can be characterized as purely personal and there are no other persons who are involved or who would have benefited had the employee succeeded, the activity is not concerted.[17] However, the employee's effort is concerted if it contains some element of collective activity.[18]

Although concerted activity usually connotes activity with fellow employees, the protection afforded by section 7 is more extensive since the definition of employee under the Act[19] is not restricted to employees of the same employer.[20] Thus, if an employee indicates support for a group of striking employees, he may be engaged in protected concerted activity since he is acting in concert with the striking employees regardless of whether the strikers are employees of his employer. Even when a non-union employee refuses to cross a picket line, he is engaged in concerted activity because he has "plighted his troth with the strikers, joined in their common cause, and has thus become a striker himself."[21]

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unpopular [supervisor] who had angered him." *Id.* at 754. The court reasoned that "the act was never intended to protect this sort of unwarranted interference with management." *Id.*

[16] The *Joanna Cotton* court noted that the defiant and insulting attitude of the employee toward his supervisor necessitated his discharge if discipline within the plant was to be maintained. *Id.* at 753. *But cf.* Jeannette Corp., 217 N.L.R.B. 653, 656-57 (1975) (discharge of employee for discussing salary demands with fellow employees unlawful despite fact that the discussion violated a company rule on keeping salary figures confidential).

[17] *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (discussions of employees' rights are not concerted activities when not in preparation for group action); Continental Mfg. Corp., 155 N.L.R.B. 255, 257-58 (1965) (validated discharge of employee for letter written criticizing management activities since not an effort to aid fellow employees).

[18] *See* Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (discharge of two employees for circulating a petition attacking company policies held unlawful); Tex-Logs, Inc., 112 N.L.R.B. 968, 972-73 (1955) (two employees discussing wage rates with management on behalf of others is concerted activity even though other employees subsequently deny they were authorized to do so).

[19] 29 U.S.C. § 152(3) (1976).

[20] *Compare* NLRB v. Circle Bindery, Inc., 536 F.2d 447, 452 (1st Cir. 1976) (discharge of employee for reporting to his union about his non-union employer using union label on products was unlawful even though action was to protect union, not fellow employees) *with* Cervantes, 87 N.L.R.B. 877, 880 (1949) (activity between employee and agricultural worker of the same employer not concerted since agricultural worker not employee under NLRA). The Board in *Cervantes* said: "[W]e do not believe that one 'employee' and nonemployees together may engage in protected concerted activities within the meaning of the Act." *Id.* at 880-81.

[21] NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970). In *Southern Greyhound Lines* the court held that nonstriking employees who refused to cross a picket line must be treated as "strikers" and therefore protected from discharge. *Id.* at

Likewise, an employee's statement to one non-union employee expressing sympathy for a threatened strike has been deemed a concerted act because it was regarded as an expression of support for a group action in the interest of other employees.[22] However, the employee's motive must be to support the common cause. For example, an employee who refuses to cross a picket line because of fear is not engaging in a concerted action.[23]

In *Mushroom Transportation Co. v. NLRB*,[24] the Court of Appeals for the Third Circuit enunciated the most expansive view ever accepted by either the Board or a court of appeals for ascertaining whether an activity is concerted. In the *Mushroom* case an employee advised his coworkers of their rights regarding terms and conditions of employment. In its effort to characterize this action the court made the following analysis:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qual-

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1301; *accord*, NLRB v. Union Carbide Corp., 440 F.2d 54, 55 (4th Cir.) (concerted activity when nonstriking employees stayed home and refused to cross a picket line set up by fellow employees), *cert. denied*, 404 U.S. 826 (1971); NLRB v. Difio Lab., Inc., 427 F.2d 170, 171 (6th Cir.) (unlawful to discharge two employees for honoring picket line set up by a union of which they were not members), *cert. denied*, 400 U.S. 833 (1970). In *Difio*, the court went so far as to say that whether the striking union did or did not want the non-union employees to honor the picket was irrelevant as long as the employees thought such action was in their best interest. 427 F.2d at 172.

[22] Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342-43 (9th Cir. 1968). The court here focused not on the "preparation for group action" aspect of the statement but rather on the fact "*that it had some relation to group action in the interest of the employees.*" *Id.* at 342-43 (emphasis added by *Signal Oil* court) (quoting Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)).

Taking a different view, the Seventh Circuit held in NLRB v. Illinois Bell Tel. Co., 189 F.2d 124 (7th Cir. 1951) that when eight employees refused to cross a picket line as a matter of principle and not to further a cause of their own they were not engaged in protected concerted activity. *Id.* at 127-28; *accord*, NLRB v. Rockaway News Supply Co., 197 F.2d 111, 114-15 (2d Cir. 1952) (discharging an employee because of his refusal to cross a picket line at a plant which his duties required him to enter was not an unfair labor practice).

[23] "One who refuses to cross a picket line by reason of physical fear does not act on principle. He makes no common cause, and contributes nothing to mutual aid or protection in the collective bargaining process." NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971). In *Union Carbide*, two employees refused to cross a picket line as a matter of principle, a third refused out of fear of personal injury. The court ordered the two men of principle reinstated but allowed the discharge of the fearful one to stand. 440 F.2d at 56. The court seemed to reason that the emotion of fear is self-centered and contrary to the spirit of concerted activity. *But see* Cinch Mfg. Corp., 91 N.L.R.B. 371, 381 (1950) (refusal to cross picket line was concerted activity even though motivated by fear).

[24] 330 F.2d 683 (3d Cir. 1964).

> ify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action . . . . [I]nasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.[25]

Yet the Third Circuit held that the employee's activity was not concerted since its sole purpose was to provide co-workers with advice concerning what each might do as an individual without involving fellow employees or the union.[26] Since the advice therefore did not contemplate some group action, the employee's activity was held to be merely individual rather than concerted.

The Third Circuit's test is but one point on a spectrum, however, since the National Labor Relations Board and the various courts of appeals continue to devise and apply their own definitions of the term "concerted." Several courts of appeals construe the term literally, and find activities to be concerted only if two or more employees are involved.[27] Other courts of appeals and the Board find the activities of even a single employee to be concerted if such activities are engaged in for a concerted purpose.[28] The seminal argument for this more expansive

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[25] *Id.* at 685.

[26] *Id.*

[27] *See* NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 718-19 (5th Cir. 1973) (employee's pressing his own individual contract demands was not concerted activity); NLRB v. Northern Metal Co., 440 F.2d 881, 884-85 (3d Cir. 1971) (individual's claim for holiday pay was in pursuit of private interests rather than concerted); *cf.* NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1084 (8th Cir. 1977) (not concerted activity where individual employee refused to work in protest of unequal pay between males and females).

The court in *Dawson* examined the Second Circuit decision of NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), but held it inapplicable since *Interboro* dealt with enforcement of a collective bargaining agreement, an element absent in *Dawson. See* 566 F.2d at 1083-84 (court declined to indicate whether it would apply *Interboro* in a non-collective bargaining situation). For a more extensive discussion of the *Interboro* doctrine see notes 33 through 66 and accompanying text *infra.*

[28] *See* Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975) (individual's inquiring about company's financing because she was worried there was no union held concerted activity); NLRB v. Ben Pekin Corp., 452 F.2d 205, 206 (7th Cir. 1971) (allegation by a single employee of a "payoff" when he failed to get an expected raise was protected concerted activity); NLRB v. Century Broadcasting Co., 419 F.2d 771, 780 (8th Cir. 1969) (concerted activity when sole engineer of radio station demanded overtime

construction of the term was advanced by the Second Circuit in *NLRB v. Interboro Contractors, Inc.*,[29] in which the court held that the efforts of a single employee "to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees."[30] This view, generally referred to as the *Interboro* rule,[31] has been described as constructive concerted activity[32] since the participation of other employees in the activity is inferred from the fact that the individual activity protects the rights of all employees.

The theory that a single employee can engage in concerted activity if his activity also benefits other employees has been followed by the Board even in non-union situations. In *Alleluia Cushion Co.*[33] an employee was discharged for filing a complaint under the California Occupational Safety and Health Administration. Although it was undisputed that the employee had acted alone, the Board held that "since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent [of fellow employees] and concert of action emanates from the mere assertion of such statutory rights."[34]

The *Interboro* rule, however, has been specifically rejected by some courts of appeals.[35] In *NLRB v. Northern Metal Co.*,[36] the rule was characterized as contrary to the clear wording of the Act especially since

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pay even though he acted completely on his own); *cf.* NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978 (9th Cir. 1973) (since complaint about job site safety was not shown to be for mutual aid and protection it was not protected activity).

[29] 388 F.2d 495 (2d Cir. 1967).

[30] *Id.* at 500.

[31] *See generally* Note, *Constructive Concerted Activity and Individual Rights: The Northern Metal—Interboro Split*, 121 U. PA. L. REV. 152 (1972). For discussion of the historical development of the concept of concerted activities see Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 COLUM. L. REV. 514 (1953). Since to be protected the activity must be "for the purpose of collective bargaining or other mutual aid or protection," it has been argued that the use of the term "concerted" is redundant. *Id.* at 529. A likely effect of deleting the qualifier "concerted" would be an increase in court decisions holding actions by individuals to be protected if they advance any element of a collective bargaining agreement, even where the immediate purpose and benefit is solely personal.

[32] The Third Circuit in NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971) labeled the *Interboro* rule a legal fiction, in that "[t]he Act surely does not mention '*concerted purposes*'." *Id.* at 884 (emphasis in original).

[33] 221 N.L.R.B. 999 (1975).

[34] *Id.* at 1000. *See also* Triangle Tool & Eng'r, Inc., 226 N.L.R.B. 1354, 1357 (1976) (employee who talked to other employees about overtime wages due them was engaged in concerted activity even though none of the others took any action).

[35] See note 27 *supra*.

[36] 440 F.2d 881 (3d Cir. 1971).

the Act does not on its face encompass activities engaged in by single employees even for concerted purposes.[37] The Third Circuit reasoned that the term "concerted" only includes acts that are mutually contrived, planned or agreed on.[38]

In *NLRB v. Buddies Supermarkets, Inc.*,[39] the Fifth Circuit denied enforcement of the Board's order and criticized its reliance on *Interboro*.[40] The court characterized a discharged employee's efforts to obtain more favorable terms of employment for himself as individual complaining beyond the scope of the protection afforded by section 7.[41] The court found the Board's reliance on *Interboro* misplaced in part because the statutory basis for the *Interboro* rule was, according to the court, suspect.[42] The Fifth Circuit did observe, however, that the activity of a single employee could be concerted in certain situations.[43]

In non-union contexts the problems that arise from the *Interboro-Northern Metal* split are compounded by the absence of a collective bargaining agreement. Although some courts of appeals reject the *Interboro* rule when no union contract is extant,[44] those courts that accept the rule consider as concerted activity a protest by one employee regarding those working conditions of vital concern to other employees.[45] Moreover, unless there is evidence of disavowal by other employees, the Board will deem such individual actions to have been impliedly consented to by non-union workers.[46] Therefore, the issue is not whether the

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[37] *Id.* at 884.

[38] *Id.*

[39] 481 F.2d 714 (5th Cir. 1973).

[40] *Id.* at 719.

[41] *Id.* at 720.

[42] *Id.* at 719.

[43] *Id.* at 720. The court cited Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342 (9th Cir. 1968) (concerted activity when employee spoke in support of a threatened strike) and NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8, 12-13 (6th Cir. 1960) (employee voicing the concerns of fellow employees on their behalf).

[44] *See* NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719 (5th Cir. 1973) (*Interboro* inapplicable outside collective bargaining context); *cf.* NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083-84 (8th Cir. 1977) (distinguished *Interboro* from collective bargaining context but failed to indicate whether *Interboro* rule applies in non-collective bargaining situation).

[45] *See* Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708-09 (1st Cir. 1975) (concertedness requirement relates to the end rather than the means). It was noted in *Ethan Allen* that if the rule was otherwise an individual who desired to institute unionization would not be protected. "If [the employer] could so extinguish seeds, it would have no need to uproot sprouts." *Id.* at 708.

[46] *See* Pink Moody, Inc., 237 N.L.R.B. No. 7, 98 L.R.R.M. 1463, 1463-64 (1978) (employee's complaint about truck that other employees had to drive was protected); C & I Air Conditioning, Inc., 193 N.L.R.B. 911, 911 (1971) (employee's complaint about safety conditions is concerted activity though he acted alone); Carbet Corp., 191 N.L.R.B.

employee is enforcing a term of the collective bargaining agreement, but whether he is either seeking to enforce a statute enacted to protect employees or protesting working conditions of concern to other employees.

Although the Board takes this position, not all courts agree. For example, in *Dawson Cabinet Co.*[47] the Board ordered reinstatement of an employee who refused to accept a new job temporarily unless she was paid as much as the males performing the job.[48] The Board held that the employee, in refusing to work for less pay, was engaged in protecting the Equal Pay Act rights of all other female employees.[49] The Eighth Circuit, however, denied enforcement of the Board's order, holding that the complainant had acted alone since there was no evidence that other employees shared her concern that the employer was paying women less for the same job than men.[50]

In *Hunt Tool Co.*,[51] it appeared that the Board had established the outer boundary of its definition of "concerted." In the *Hunt* case, an employee filed suit against his employer under both the Jones Act and the Longshoreman's and Harbor Worker's Compensation Act for

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892, 892 (1971) (employee's complaint about ventilation system was concerted even though he was not officially authorized to complain for others).

The Board has stated:

> [E]ven individual protests are protected as concerted activity '[i]f the matter at issue is of moment to the group of employees complaining and if the matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group.'

Hugh H. Wilson Corp., 171 N.L.R.B. 1040, 1046 (1968) (quoting Guernsey-Muskingum Elec. Coop., Inc., 124 N.L.R.B. 618, 624 (1959)).

[47] 228 N.L.R.B. 290 (1977).

[48] *Id.* at 293.

[49] *Id.* at 292.

[50] NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083-84 (8th Cir. 1977). In another Board decision, the employer was held to have violated § 8(a)(1) by discharging two employees who had attempted to obtain overtime wages to which they were entitled, and who had also cooperated with the Department of Labor in its investigations of these alleged violations. G.V.R., Inc., 201 N.L.R.B. 147, 147 (1973). The Board found that the two employees had conferred on this matter and were clearly united in their determination to obtain the wages to which they were entitled. The Board went further, however, and held that any single employee covered by a federal statute governing wages, hours, and conditions of employment who participates in a compliance investigation of his employer or who protests his employer's non-compliance is engaged in protected concerted activity for mutual aid and protection. *Id.*; *accord*, White's Gas & Appliance, Inc., 202 N.L.R.B. 494, 495 (1973) (pursuit of overtime pay claims held concerted activity); Thurston Motor Lines, Inc., 159 N.L.R.B. 1265, 1306-07 (1966) (contrary to public policy to remove complaints to public authorities from protection of NLRA).

[51] 192 N.L.R.B. 145 (1971).

damages resulting from an on-the-job injury.[52] Although several decisions have held that an employee may be engaged in protected concerted activity when he files suit against his employer,[53] if the suit is a purely personal claim, at least under the analysis in *Hunt*, the activity is individual rather than concerted. However, in its continuing expansion of the *Interboro* rule, the Board has recently overruled *Hunt Tool Co.* on the theory that the filing of a claim, such as the one in *Hunt*, is of common interest to other employees who might be similarly situated in the future.[54]

The Board has continued to expand the *Interboro* rule to cover not only situations in which an employee seeks to enforce a collective bargaining agreement[55] or a statute enacted for the benefit of employees,[56] but also to cover situations in which an employee's complaints are directed toward employment conditions that are of concern to other employees.[57] For example, in *Diagnostic Center Hospital Corp.*[58] an employee had written a letter to her employer protesting the employer's failure to grant a wage increase and alleged discriminatory practices.[59] The Board found that the discharged employee had been engaged in protected concerted activity when she wrote the letter even though she had not been designated to act for the other employees and even though they were not informed of the letter.[60] Since evidence showed that the other employees shared her concern and interest in the subject matter of the letter, the employee who wrote the letter was acting concertedly on behalf of her fellow employees.[61] Thus, so long as there is

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[52] *Id.* at 145.

[53] *See* Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962) (protected activity when single employee filed a contract pay claim).

[54] Krispy Kreme Doughnut Corp., 245 N.L.R.B. No. 135 (1979). *See* Self and Cycle Marine Distrib. Co., 237 N.L.R.B. No. 9 (1978) (relied on in *Krispy Kreme*).

[55] New York Trap Rock Corp., 148 N.L.R.B. 374, 375 (1964) (attempts to implement collective bargaining agreement affects all employees so it is therefore protected concerted activity); Merlyn Bunney, 139 N.L.R.B. 1516, 1519 (1962) (single employee's efforts to enforce collective bargaining contract is concerted activity).

[56] *See* Dawson Cabinet Co., 228 N.L.R.B. 290, 292 (1977). See note 50 and accompanying text *supra*.

[57] *See* Waco Insulation, Inc., 223 N.L.R.B. 1486, 1487 (1976) (in addition to seeking a raise employee complained about working conditions), *modified*, 567 F.2d 596, 602 (4th Cir. 1977).

[58] 228 N.L.R.B. 1215 (1977).

[59] *Id.*

[60] *Id.* at 1217.

[61] Although the Board held that the employee's action was a concerted activity, the discharge was upheld because the evidence failed to show that the employer knew at the time of the employee's discharge that she had written the letter. *Id.* at 1216. For a discussion of this knowledge requirement in the determination of "concerted activity," see text accompanying notes 68 through 74 *infra*.

evidence that the issue in question is of common concern to other workers, the affected workers need not have designated the complainant as their spokesman in order for his activities to be deemed concerted.[62]

This analysis should be contrasted with the more traditional view of concerted activity followed by those courts of appeals that reject the *Interboro* rule.[63]

> The mere fact that the men did not formally choose a spokesman or that they did not go together to see Mr. Scott does not negative concert of action. It is sufficient to constitute concerted action if from all of the facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management.[64]

The positions of the Board and the anti-*Interboro* courts may be distinguished according to the degree of mobilization each requires. The courts under consideration deem an action to be concerted only if a reasonable inference can be drawn from the evidence that the employees have decided to press their grievance against management.[65] On the other hand, the Board merely requires that the matter at issue be of common concern.[66] In short, the Board, unlike the courts here under discussion, does not require evidence of group mobilization. The Board has summarized its own position in this regard as follows:

> The Board has held too often to warrant citation of authority here that where an individual employee turns to his employer alone to improve his condition of employment and is in no sense joined in his action by any other workman, he has not engaged in concerted activities in the statutory sense and may be discharged with impunity.
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> . . . .
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> When an individual workman demands that the employer change the hours of work for the entire group, his success or failure affects them all. Does it follow from this that he was acting in concert with them and was therefore protected against discharge for such individual personal conduct? Perhaps. If . . . the rest of employees think as did the

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[62] *See* Detroit Forming Inc., 204 N.L.R.B. 205, 212 (1973) (an attempt to enlist fellow employees in common action to better their conditions is protected concerted activity even if others refuse to join in cause).

[63] See note 27 *supra*.

[64] NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8, 12 (6th Cir. 1960). *See generally* Oldham, *Organized Labor, the Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935, 1003-07 (1973).

[65] NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8, 12 (6th Cir. 1960).

[66] *See* Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215, 1217 (1977) (activity is concerted if it relates to a matter of common concern).

> sole activist, agree with his thoughts that the employer should change the work schedule, but whatever he does he does alone, is that activity then to be deemed concerted and protected? Again, perhaps. Assume, finally, that while agreeing in principle with the sole actor, the rest of the employees make it clear they wish to disassociate themselves from his activity, want nothing to do with it, refuse to sign his petition to the employer, is he than engaged in statutory concerted activity? [No.][67]

It must be noted, however, that yet another factor enters the equation. Even if an activity would be concerted under one or more of the definitions that have been considered, the acting employee may not be protected unless at the time of discipline or discharge the employer had knowledge of the concerted nature of the activity in question.[68] This requirement derives from the common law doctrine that an employer has the right to dismiss his employees at will. This right has been abrogated by federal labor law only to the extent that it is exercised to deter protected concerted activities.[69] Thus, in *Standard Brands, Inc.*,[70] two employees complained to various company officials about their supervisor's handling of the department. Yet, since the official who actually discharged one of the complaining employees was not aware that there were two employees acting in concert, no violation was found by the Board.[71] The courts have reasoned that if the employer "from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they choose to remain silent, bear the risk of being discharged."[72]

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[67] Del E. Webb Realty & Management Co., 216 N.L.R.B. 593, 593-94 (1975).

[68] *See* NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973) (record must show employer's knowledge of concerted activity); Texas Aluminum Co. v. NLRB, 435 F.2d 917, 919 (5th Cir. 1970) (employer's knowledge of concerted activity required, but may be inferred from circumstances); Southwest Latex Corp. v. NLRB, 426 F.2d 50, 56 (5th Cir. 1970) (discharge upheld since record reflected that employer was without knowledge of concerted activity); Indiana Gear Works v. NLRB, 371 F.2d 273, 276-77 (7th Cir. 1967) (employer had no knowledge that an employee's critical cartoons were concerted activity).

[69] NLRB v. Condensor Corp., 128 F.2d 67, 75 (3d Cir. 1942); *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (the Act recognizes right of employer to select employees if not motivated by intent to intimidate or coerce); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 721-22 n.22 (5th Cir. 1973) (upheld discharge on basis of employee's dishonesty); NLRB v. I.V. Sutphin Co.-Atlanta, Inc., 373 F.2d 890, 893 (5th Cir. 1967) (allowed discharge of employee who had threatened other employees).

[70] 196 N.L.R.B. 1006, 1006-08 (1972).

[71] *Id.* at 1006-08. *But see* NLRB v. Transport Clearings, Inc., 311 F.2d 519, 523 (5th Cir. 1962) (knowledge of office manager imputed to general manager).

[72] NLRB v. Ford Radio & Mica Corp., 258 F.2d 457, 465 (2d Cir. 1958). This reasoning

Of course, this knowledge requirement is a double-edged sword. An otherwise legal firing is unlawful if the employer is motivated even in part by a belief that the employee is engaging in protected concerted activity. Indeed, even if the employer is mistaken in his belief that the discharged employee was engaged in protected activity, the firing is nevertheless illegal.[73] The issue is not whether there are independent, legitimate grounds for the discharge, but whether the discharge was illegally motivated.[74]

As the previous discussion indicates, the determination of concerted status involves many factors. When the factual question of employer knowledge or belief at the time discharge is considered along with the conflicting definitions of "concerted" promulgated by the Board and the various courts of appeals, it becomes apparent in this context that the formulation of a general principle of black letter law is impossible. The determination of protected status must be approached case-by-case and forum-by-forum. Such uncertainty, however, is detrimental to both the workers and employers. It must be recalled that the determination of concerted status is the threshold question upon which federal statutory protection hinges. Moreover, many companies employ workers in more than one federal appellate circuit. Simple fairness would seem to require that a single, uniform standard be adopted. The present posture

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does not mean, however, that either formal or informal notice of their purpose is required of employees engaging in concerted activities. *Id.* at 465; *see* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (employees do not necessarily lose their right to engage in concerted activity for failure to make specific demands known).

[73] *See* Henning & Cheadle, Inc. v. NLRB, 522 F.2d 1050, 1052-53 (7th Cir. 1975) (question is whether activity as perceived by employer is protected); NLRB v. Garner Tool & Die Mfg., Inc., 493 F.2d 263, 268 (8th Cir. 1974) (suspicion of protected activity is exception to rule that employer have knowledge); NLRB v. Ritchie Mfg. Co., 354 F.2d 90, 98-99 (8th Cir. 1965) (actual participation in concerted activity is not necessary when suspected participation motivates discharge).

[74] This is the generally accepted rule under Board precedent. A discharge may be based on legitimate reasons, but if it is "partly in reprisal for protected concerted activity, it is unlawful." Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 575 (1976), *enforcement denied*, 574 F.2d 891, 891-92 (6th Cir. 1978) (record failed to support Board's finding that discharge was based on participation in protected activity).

If an employee is discharged for any legitimate reason, the Act is not violated, provided that the employer does not "substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities." Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1352 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970); *cf.* Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976) (burden of proof is on Board to show that legitimate grounds were "pretextual"). *See also* NLRB v. Hanes Hosiery Div., 413 F.2d 457, 457-58 (4th Cir. 1967) (absence from work station was pretext for discriminatory discharge); Frank Paxton Lumber Co., 235 N.L.R.B. No. 83, 98 L.R.R.M. 1072, 1073 (1978) (evidence showed that discharge for violation of work rules was pretexual).

of the law brings to mind remarks made by Samuel Johnson in another context.

> He that is thus governed, lives not by law, but by opinion; not by a certain rule to which he can apply his intention before he acts, but by an uncertain and variable opinion, which he can never know but after he has committed the act on which the opinion shall be passed. He lives by a law (if a law it be), which he can never know before he has offended it . . . . *[M]isera est servitus ubi jus est aut incognitum aut vagum.*[75]

II. Proper Objectives of Protected Concerted Activity

Activities must be concerted to be protected, but not all concerted activities are protected.[76] To be protected, the concerted activity must be engaged in for "mutual aid and protection." This phrase has been broadly construed and generally deemed to include any activity the purpose of which is to affect the well-being of a group of employees.[77] Usually the objectives of the activity must relate in some way to terms and conditions of employment.[78] Protests regarding matters only indirectly related to working conditions will not be protected absent some significant nexus with employment relationship. In *G & W Electric Specialty Co. v. NLRB*,[79] an employee who sought support for a petition during working hours and on company premises was discharged for violating a company rule against solicitation.[80] The petition criticized the

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[75] J. Boswell, Life of Johnson 497 (W. Chapman ed. 1970) (it is miserable to serve when rights are unknown or vague).

[76] NLRB v. Superior Tool & Die Co., 309 F.2d 692, 695 (6th Cir. 1962); *see* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255-56 (1939) (to be protected, concerted conduct must be lawful); Shelly & Anderson Furn. Mfg. Co. v. NLRB, 497 F.2d 1200, 1203 (9th Cir. 1974) (to be protected, conduct must: (1) be work related, (2) further group interest, (3) seek specific remedy, and (4) be lawful); Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947, 951 (6th Cir. 1968) (to be protected, concerted activity must concern conditions of employment).

[77] *See* Henning & Cheadle, Inc. v. NLRB, 522 F.2d 1050, 1054 (7th Cir. 1975) (activity regarding discharge of supervisory employee is protected); NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8, 12 (6th Cir. 1960) (appointment of a foreman was proper subject for concerted activity). *See generally* Note, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. Pa. L. Rev. 152, 161 (1972).

[78] *Compare* G & W Elec. Specialty Co., 360 F.2d 873, 876 (7th Cir. 1966) (employees' credit union activities where employer was in no way involved were deemed not to be for mutual aid or protection) *with* Eastex, Inc. v. NLRB, 98 S. Ct. 2505, 2512-13 (1978) (employees' newsletter advocating certain legislative action deemed protected activity) *and* Kaiser Eng'rs v. NLRB, 538 F.2d 1379, 1384-85 (9th Cir. 1976) (employees' lobbying legislators regarding national immigration was protected). *See generally* Getman, *supra* note 3, at 1218.

[79] 360 F.2d 873.

[80] *Id.* at 875.

operation of a credit union created and operated by the employees. The petition did not request corrective action from the employer; indeed, the matter was not even subject to the employer's control.[81] In denying enforcement of the Board's order the Seventh Circuit held that the Board's finding that such activities were for mutual aid and protection was contrary to the intent of the Act and went beyond the Act's concern with labor-management relations.[82]

Yet, confronted with similar facts, the Ninth Circuit in *Kaiser Engineers v. NLRB*[83] found the activity to be concerted and within the protection of section 7. In *Kaiser*, the employees, civil engineers, sent a letter to Congress opposing changes in the immigration laws that would have permitted the importation of alien engineers. Kaiser considered the letter to be an embarrassment to the company and discharged the worker who had drafted it. Although federal immigration policy is clearly outside the control of management,[84] the court held that the issue was closely related to the employment security of the engineers. For this reason, the situation in *Kaiser* was deemed distinguishable from that in *G & W Electric Specialty Co.* In that case the circulated petition dealt with the status of employees as depositors in a credit union; in *Kaiser*, the controversial letter related to the status of the engineers as employees.[85] Thus, section 7 protection can extend to matters beyond the control of management.[86]

Similarly, participation in sympathy strikes,[87] refusals to cross picket lines[88] and other acts in support of fellow employees or union

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[81] *Id.* at 876.

[82] *Id.* at 876-77. For criticism of this rationale see Getman, *supra* note 3, at 1218-22.

[83] 538 F.2d 1379 (9th Cir. 1976).

[84] *Id.* at 1385.

[85] *Id.*

[86] Illustrative of this principle is Bethlehem Shipbldg. Corp. v. NLRB, 114 F.2d 930 (1st Cir. 1940), in which employees' endorsing a change in workmen's compensation laws in opposition to the position of the employer was protected. *Id.* at 941; *accord*, Eastex, Inc. v. NLRB, 98 S. Ct. 2505, 2512-13 (1978) (distribution of newsletter opposing incorporation of right-to-work provision into state constitution was protected).

[87] *See* NLRB v. C.K. Smith & Co., 569 F.2d 162, 165 (1st Cir. 1977) (sympathy strike by employees against common employer is protected), *cert. denied*, 98 S. Ct. 3070 (1978); Newspaper Prod. Co. v. NLRB, 503 F.2d 821, 830 (5th Cir. 1974) (sympathy strikers entitled to same protection as actual strikers).

[88] NLRB v. Union Carbide Corp., 440 F.2d 54, 55-56 (4th Cir.) (employees refusing to cross picket line as matter of principle are protected), *cert. denied*, 404 U.S. 826 (1971); NLRB v. Difio Lab., Inc., 427 F.2d 170, 171-72 (6th Cir.) (employer has no right to require nonstriking employees to cross picket line), *cert. denied*, 400 U.S. 833 (1970); NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970) (employee refusing to cross picket line becomes "striker" himself and is thereby protected). *See generally* Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV.

members[89] have traditionally been regarded as protected concerted activities despite the fact that they involve matters outside the participating employee's own relationship with his employer. Perhaps the best justification for the protection of such activities is that, although the dispute does not immediately concern the employee, the employee knows that by supporting the strike or honoring the picket line he is assuring himself of the reciprocal support of those whom he is helping if and when he becomes the primary striker. "[T]he solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."[90]

Myriad other objectives have been held to be proper goals of protected concerted activity. One of the most common is protest over the safety of working conditions. Violations of section 8(a)(1) have been found in situations in which the employer had disciplined or discharged employees for refusing to work under conditions they believed to be dangerous.[91] In addition, employees' refusal to work with defective

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647, 698-99 (1975); Connolly, *Section 7 and Sympathy Strikes: The Respective Rights of Employers and Employees*, 25 LAB. L.J. 760, 762-63 (1974); Smith, *The Supreme Court, Boys Market Labor Injunctions, and Sympathy Work Stoppages*, 44 U. CHI. L. REV. 321, 352 (1977).

[89] *See* General Tire & Rubber Co. v. NLRB, 451 F.2d 257, 259 (1st Cir. 1971) (employee who crossed picket line but refused to do "struck work" was protected); NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503, 505-06 (2d Cir. 1942) (resolution protecting employer's action against another strike was protected); Fort Wayne Corrugated Paper Co. v. NLRB, 111 F.2d 869, 874 (7th Cir. 1940) (employee's union activities outside scope of his employment relationship protected). *See generally* Newborn, *Restrictions on the Right to Strike on the Railroads: A History and Analysis (II)*, 24 LAB. L.J. 234, 248 (1973); Oldham, *supra* note 64, at 1004.

[90] NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503, 505-06 (2d Cir. 1942).

[91] *See* Elam v. NLRB, 395 F.2d 611, 614 (D.C. Cir. 1968) (work stoppage by mailboys in mailroom of newspaper in protest of lack of safety devices on machines protected); Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966) (action of employee complaining about lack of safety goggles and other poor working conditions protected even though complaining employee was not subjected to those conditions); NLRB v. Belfry Coal Corp., 331 F.2d 738, 740 (6th Cir. 1964) (refusal of two employees to work in area of mine declared unsafe by state board protected); Modern Carpet Indus., Inc., 236 N.L.R.B. No. 132 (1978) (refusal to work with lead that had been stored with radioactive material protected); Du Tri Displays, Inc., 231 N.L.R.B. No. 128 (1978) (protests over excessive chemical fumes protected). *Contra*, United States Steel Corp. v. United Mine Workers, 393 F. Supp. 942, 948 (W.D. Penn. 1975) (men in mine cannot refuse to go to work simply because they feel some safety hazard involved). At least one court has even allowed employees to protest future dangerous conditions. *See* Bob's Casing Crews, Inc. v. NLRB, 458 F.2d 1301, 1304 (5th Cir. 1972) (action of employee in informing employer that crew hired to lay down casing wanted relief crew to pick up drill pipe because they would be too tired to do it safely was protected even though protest concerned future conditions instead of current ones).

The courts and the Board have also been active in protecting conduct which protests

equipment has usually been held to be protected.[92] Employees may not be safe from discharge or discipline if the protests regard risks inherent in the nature of the job since such protests essentially amount to a protest against the job itself.[93] This analysis is not applicable, however,

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conditions that are merely unpleasant as opposed to dangerous. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 15-16 (1962) (walkout by employees because shop was too cold to work in protected as concerted activity despite fact that employer had made a good faith effort to raise temperature in machine shop); NLRB v. Elias Bros. Restaurant, 496 F.2d 1165, 1166-67 (6th Cir. 1974) (protest by waitresses that work area was too hot, floor was wet, and lack of spoons protected); NLRB v. Okla-Inn, 488 F.2d 498, 503 (10th Cir. 1973) (court upheld walkout of maids caused by generally poor working conditions); NLRB v. KDI Precision Prods. Inc., 436 F.2d 385, 386-87 (6th Cir. 1971) (ultimatum of "fans or walkout" protected in protest over hot working conditions); NLRB v. Southern Silk Mills, 209 F.2d 155, 155 (1953) (spontaneous walkouts by employees in protest of excessive heat protected); Rockford Newspapers, Inc., 229 N.L.R.B. 429, 433 (1978) (discharge because of complaints about drafts in working area violates NLRA); Interlake, Inc., 218 N.L.R.B. 1043, 1049 (1975) (although work in furnace duct was normally hot and dirty, where heat was unbearable refusal to work was protected).

[92] *See* Elam v. NLRB, 395 F.2d 611, 614 (D.C. Cir. 1968) (refusal of mailboys to work on unsafe machine protected); Pink Moody, Inc., 237 N.L.R.B. No. 7 (1978) (refusal to drive truck with defective brakes may not be disciplined); Essex Int'l, Inc., 213 N.L.R.B. 260, 265-66 (1974) (employees may not be disciplined for refusing to work on broken machine made temporarily operable by employer).

In addition to these cases, there are other sources of protection for employees' refusing to work in unsafe conditions. Section 502 of the Taft-Hartley Act states "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this chapter." 29 U.S.C. § 143 (1976). Although this statute can be important in a non-union context, it is invaluable in an organized plant since the bargaining agreement may contain a "no-strike" clause. *See* NLRB v. Knight Moreley Corp., 251 F.2d 753, 759 (6th Cir. 1958) (walkout in protest of abnormally dangerous condition does not violate no-strike clause in labor contract). The employee also may turn to appropriate provisions of the Occupational Safety and Health Act of 1970, which allow the employee to complain to the Occupational Safety and Health Administration that the working conditions are unsafe. *See* Occupational Safety and Health Act of 1970, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.). However, where the employee is confronted with a hazardous working condition that could result in death or serious injury, the employee may refuse to work until the condition is corrected and be protected in his refusal even though he failed to pursue the normal OSHA procedures. 29 C.F.R. § 1977.12(b)(2) (1977). *See also* Note, *Imminent Danger: A Gap in Occupational Safety and Health Protection,* 5 OHIO N.U.L. REV. 479 (1978).

[93] *See* Reed v. NLRB, 430 F.2d 331, 333-34 (10th Cir. 1970) (employee walkout in protest of dangers encountered during winter logging in Wyoming unprotected because inclement conditions were inherent aspect of job); United States Steel Corp. v. United Mine Workers, 393 F. Supp. 942, 948 (W.D. Penn. 1975) (men in mine cannot refuse to work just because a safety hazard is involved); Mal Landfill Corp., 210 N.L.R.B. 167, 170-72 (1974) (since operation of a landfill inherently involves the risk of fire, where employer has complied with all federal and state standards any employee protest over fire hazards is unprotected).

when the inherent risks of the job are greatly increased by outside influences such as occasional inclement weather.[94] As when the job is inherently dangerous, the employees are considered to have assumed the risks involved and only those protests which are against an increase in the level of danger are protected.[95]

An area that is often related to safety protests is the filing of a complaint with a third party against the employer for safety violations. For instance, it may be unlawful to discharge or discipline an employee who threatens to file a complaint with the federal Occupational Safety & Health Administration.[96] As noted above in the discussion of concerted activity, whether such conduct by an employee acting alone is protected may depend on the forum one is in and the circuit in which one is located.[97] Nonetheless, an employee's efforts to enforce an employer's statutory duties relating to safety have been protected when the employee filed complaints with various governmental agencies.[98]

The filing of a complaint in an attempt to force the employer to comply with other statutory responsibilities has also been protected[99]

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[94] *See* Union Boiler Co., 213 N.L.R.B. 818, 820-22 (1974) (refusal of employees to work overtime because rainy weather had reduced visibility and greatly increased danger of slipping while cleaning inside of silo protected); American Homes Systems, 200 N.L.R.B. 1151, 1155 (1972) (refusal of carpenters to work outside in sub-zero weather protected).

[95] *Compare* Interlake, Inc., 218 N.L.R.B. 1043, 1049 (1975) (although work in furnace duct was normally hot, where duct was so hot normal equipment was ineffective, employees are protected in refusing to work) *with* Mal Landfill Corp., 210 N.L.R.B. 167, 170-72 (1974) (since operation of a landfill inherently involves risk of fire, employees may not protest presence of fire hazards).

[96] 29 U.S.C. § 660(c)(1) (1976); 29 C.F.R. § 1977.12 (1977).

[97] See notes 27 through 43 and accompanying text *supra. See also* Cloke, *Concerted Activity and the National Labor Policy*, 5 SAN FERN. U.L. REV. 289 (1976).

[98] *See* Socony Mobil Oil Co. v. NLRB, 357 F.2d 662, 663-64 (2d Cir. 1966) (employer may not discipline or discharge an employee who filed a complaint with the appropriate governmental agency with regard to the unsafe operation of a vessel); Walls Mfg. Co. v. NLRB, 321 F.2d 753, 754 (D.C. Cir.) (employee's action in sending a letter to state department of health informing the agency of the unsanitary conditions at employer's premises protected), *cert. denied*, 375 U.S. 923 (1963); B & P Motor Express, 230 N.L.R.B. 653, 655 (1977) (employee who filed safety complaint with Department of Transportation may not be disciplined); GTE Lenkurt, Inc., 215 N.L.R.B. 190, 199 (1974) (employee may file safety complaint with OSHA without being subject to discharge); Detroit Forming, Inc., 204 N.L.R.B. 205, 212-13 (1973) (employee who files complaint with the local health department is safe from discharge).

[99] *See* Rockford Newspapers, Inc., 229 N.L.R.B. 429, 431 (1978) (filing sex discrimination charge with EEOC is a protected concerted activity); King Soopers, Inc., 222 N.L.R.B. 1011, 1018 (1976) (filing of race discrimination charge with EEOC protected); G.V.R., Inc., 201 N.L.R.B. 147, 152-53 (1973) (filing charge with Department of Labor with regard to employer's requirement of kickbacks from employees does not subject employee to discharge); Advance Carbon Prod., Inc., 198 N.L.R.B. 741, 747-48 (1972) (employee who filed race discrimination charge with Fair Employment Practices Commis-

under the theory that the complaint was filed for the mutual aid and protection of all employees.[100] In fact, this reasoning has been used to protect from discharge an employee who filed suit against the employer to collect wages wrongfully withheld by the employer,[101] as well as other wage-related protests.[102] Employees may also lawfully protest a change in either the pay system[103] or the output requirements of a

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sion may not be discharged or refused rehiring on that basis). *Contra*, NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1082-83 (8th Cir. 1977) (discharge of female employee who filed wage complaint based on sex discrimination with Hour and Wage Division of Department of Labor did not violate NLRA rights of employee because action by one person is not "concerted activity").

It is beyond the scope of this Article to discuss the statutory provisions with which the above cases are concerned. However, it should be noted that some of these statutes provide remedies for retaliation in addition to those set up by the case law surrounding the NLRA. Therefore, even if an employer is held not to be in violation of the National Labor Relations Act for discharging an employee who has filed an EEOC discrimination charge, he would be in violation of the retaliation prohibition found in Title VII. *See* 42 U.S.C. § 2000e-3(a) (1976). *See also* Emporium Capwell Co. v. Western Addition Comm. Organization, 420 U.S. 55, 71-72 (1975).

[100] Alleluia Cushion Co., 221 N.L.R.B. 999, 999-1001 (1975) (where one employee seeks to enforce an employer's statutory duties, the activity will be deemed concerted). This appears to be the Board's viewpoint at the present time. The courts, however, are less likely to accept this argument. *See* NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1082-84 (8th Cir. 1977) and cases cited therein.

[101] *See* Auto Club, 231 N.L.R.B. No. 99 (1977) (filing suit to collect commissions wrongfully withheld protected); Ambulance Serv. of New Bedford, Inc., 229 N.L.R.B. 106, 109-10 (1977) (employee who filed criminal complaint against employer who continuously dishonored paychecks is protected from discharge); Trinity Trucking & Materials Corp., 221 N.L.R.B. 364, 364-66 (1975) (recognizing fact that discharge of employee solely because he filed a civil suit to collect on dishonored paychecks may be unfair labor practice), *supplemented*, 227 N.L.R.B. 792 (1977). Despite this rule, the Board has expressly stated that an employee is not protected in filing a civil suit against the employer for recovery of personal injury damages. *See* Hunt Tool Co., 192 N.L.R.B. 145, 146 (1971) (upholding discharge of employee who filed personal injury suit under Jones Act).

[102] *See* Community Hosp. of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 609-10 (4th Cir. 1976) (employees' actions in writing letter to newspaper and appearing on television with regard to low salary of nurses protected); Fairmont Hotel Co., 230 N.L.R.B. 874, 878 (1977) (protests over tipping arrangements held to be protected); Pacific Pollution Control, Inc., 227 N.L.R.B. 293, 296-97 (1977) (protests made to boss by employees when they had not been paid or reimbursed for expenses held protected); Hamlet Steak House, Inc., 197 N.L.R.B. 632, 635 (1972) (waitresses who protest tipping arrangement are engaged in protected activity).

[103] Hale Mfg. Co., 228 N.L.R.B. 10, 12-13 (1977) (employees' request that plant drop bonus plan in favor of straight hourly wages protected); Empire Gas, Inc., 224 N.L.R.B. 628, 629-30 (1976) (protest letter that argued against company's new bonus plan and for old commission arrangement held protected activity); Rinkie Pontiac Co., 216 N.L.R.B. 239, 242 (1975) (protesting of car dealer's implementation of a new insurance program with incentive pay features held protected); Blue Star Knitting, Inc., 216 N.L.R.B. 312, 316 (1975) (employees who protested piecework rates cannot be disciplined); Browning Indus.

job,[104] as well as any order to work what they consider to be excessive overtime.[105] However, if an employer refuses to perform overtime work his action is protected only if his status is that of a striker. Thus, in such a situation, he may not continue to work his regular hours.[106]

Protests of the discharge of a fellow employee have been held to be proper objectives of protected concerted activity.[107] On the other hand, employees have only a limited right to protest the discharge of a supervisor[108] or management's selection of a new supervisor.[109] Only if the super-

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Venetian Marble, 213 N.L.R.B. 269, 272 (1974) (questioning of new piecework system held protected activity).

[104] *See* Digital Equip. Corp., 226 N.L.R.B. 1278, 1283 (1976) (invalidated discharge of employee who considered a production quota to be unfair); American Motors Corp., 214 N.L.R.B. 455, 462 (1974) (efforts to discourage the wearing of "Fight Speed Up" T-shirts held to interfere with protected activity).

[105] *See* Ford Motor Co., 221 N.L.R.B. 663, 668 (1975) (employees may not be discharged for protesting employer's overtime policy); Imperial Bedding Co., 216 N.L.R.B. 934, 938 (1975) (same); Barkus Bakery, Inc., 214 N.L.R.B. 478, 481 (1974). *But see* C.G. Conn, Ltd. v. NLRB, 108 F.2d 390, 396 (7th Cir. 1939) (discharge of employees unilaterally attempting to set out conditions concerning overtime held not violative of NLRA).

[106] First Nat'l Bank v. NLRB, 413 F.2d 921, 925 (8th Cir. 1969); *see* NLRB v. John S. Swift Co., 277 F.2d 641, 646 (7th Cir. 1960) (discharge of employees who refused to work overtime held lawful under NLRA).

[107] *See* United Merchants & Mfr., Inc. v. NLRB, 554 F.2d 1276, 1278 (4th Cir. 1977) (concerted work stoppage by unrepresented employees in protest of discharge of fellow employees is protected); NLRB v. Imperial Bedding Co., 519 F.2d 1073, 1075 (5th Cir. 1975) (a strike in protest of the suspension of fellow employee is protected); Pepsi Cola Bottling Co., 449 F.2d 824, 829-30 (5th Cir.) (refusal to work or leave plant until reinstatement of employees held not so illegal as to warrant discharge), *cert. denied*, 407 U.S. 910 (1971); Howard Mfg. Co., 227 N.L.R.B. 1858, 1866 (1977) (picketing plant in protest of supervisor's discharge is protected); Eagle Int'l, Inc., 221 N.L.R.B. 1291, 1298 (1975) (discharge and refusal to reinstate employees protesting discharge of fellow employees is an unfair labor practice). *But see* Cone Mills Corp. v. NLRB, 413 F.2d 445, 454 (4th Cir. 1969) (eight employees stopping work to protest discharge of fellow employee not protected because of rebellious attitude and infringement of employer's rights).

[108] Section 2(11) of the NLRA defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment.

29 U.S.C. § 152(11) (1976). *Compare* Great W. Sugar Co., 137 N.L.R.B. 551, 556-57 (1962) (staff with both supervisory and rank-and-file activities not considered supervisors) *with* Whitmeyer Lab., Inc., 114 N.L.R.B. 749, 751 (1955) (contrary holding). The trend in later cases has been to allow the supervisor to retain rank-and-file status with regard to union membership and bargaining powers. *See* Gaf Corp. v. NLRB, 524 F.2d 492, 497 (5th Cir. 1975) (rank-and-file machinist who was acting maintenance supervisor and in line for promotion not a supervisor under Act); Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151,

visor's responsiblities are related to the employee's own employment does even a limited right exist to attack the managerial decision.[110] Although their power to protest the selection of a supervisor is narrowly circumscribed, employees are usually protected in activities that protest the improper conduct of a supervisor. In *Leslie Metal Arts Co.*[111] the employees complained that a supervisor failed to take disciplinary measures against an employee who was misbehaving on the job. The Board held that since supervisors are responsible for maintaining proper working conditions, an employee's protest of a failure to satisfy this duty was protected.[112] Similarly, employees may within the protection of section 7 object to a supervisor's rude manner of directing the department.[113] However, a protest of a supervisor's policies is not protected if it is made in bad faith to undermine the supervisor's authority with the intent to

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1158 (7th Cir.) (lead engineer does not possess enough managerial powers to be supervisor), *cert. denied*, 400 U.S. 831 (1971). *But see* E.I. DuPont De Nemours & Co., 210 N.L.R.B. 395, 397 (1974) (foremen promoted to supervise a new but temporary departmental plant ineligible to vote as employees even though told that their tenure was temporary).

[109] It should be noted that protests concerning either the hiring or discharging of supervisors are generally unprotected. *See* NLRB v. Crimptex, Inc., 517 F.2d 501, 504 n.5 (1st Cir. 1975) (strike is unprotected if its purpose is to obtain the removal of a supervisor); American Art Clay Co. v. NLRB, 328 F.2d 88, 91 (7th Cir. 1964) (walkout by employees after announcement of change to foreman held not protected under the Act); Cleaver-Brooks Mfg. Corp. v. NLRB, 264 F.2d 637, 641 (7th Cir.) (discharge of four employees' protesting appointment of a new foreman was lawful), *cert. denied*, 361 U.S. 817 (1959); NLRB v. Reynolds Int'l Pen Co., 162 F.2d 680, 684 (7th Cir. 1947) (employee's action in protesting the demotion of a foreman is not concerted activity). *Contra*, Howard Mfg. Co., 227 N.L.R.B. 1858, 1866 (1977) (picketing plant in protest of supervisor's discharge is protected); *see* Magna Visual v. NLRB, 516 F.2d 876, 877 (8th Cir. 1975) (employees' protesting the promotion of an unpopular co-employee to supervisor protected); NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir.) (discharge of employee who drafted letter to employer concerning the selection of a cashier held unlawful), *cert. denied*, 335 U.S. 845 (1948).

[110] Courts have inferred that employee protests concerning supervisory positions are protected if the identity of that supervisor has an unusually direct impact upon the employees' duties. *See* Dobbs Houses v. NLRB, 325 F.2d 531, 538 (5th Cir. 1963) (discharge of supervisor who was sympathetic buffer for employees was legitimate concern); Kelso Marine, Inc., 199 N.L.R.B. 7, 13 (1972) (employees had legitimate interest in the discharge of supervisor since it had impact upon their working conditions); Plastilite Corp., 153 N.L.R.B. 180, 182 (1965) (if supervisor's identity has impact on employees' job interests conditions of employment are involved), *modified*, 375 F.2d 343 (8th Cir. 1967); Guernsey-Muskingum Elec. Coop., Inc., 124 N.L.R.B. 618, 623 (1959) (hiring of newcomer as foreman related to mutual aid and protection of employees), *enforced*, 285 F.2d 8 (6th Cir. 1960). See notes 197 through 199 and accompanying text *infra*.

[111] 208 N.L.R.B. 323 (1974).

[112] *Id.* at 326.

[113] *See* K-Mart Enterprises, Inc., 202 N.L.R.B. 358, 364 (1973) (employee's complaining about supervisor's yelling and screaming held a protected activity).

have him removed in favor of a more lenient supervisor.[114]

As a general rule, when the object of employee protest is a discretionary act of management, the means of protest that will be protected are relatively restricted. Thus, while a walkout might be an appropriate response to unsafe working conditions,[115] a grievance meeting might be the only protected response to management's selection of supervisory personnel deemed undesirable by the workers.[116] This doctrine, although far from absolute, is apparently based on the theory that management, in order properly to perform its managerial functions, must be free from the threat of employee economic reprisals against the exercise by management of its discretion in traditional areas of managerial perogative.[117] It should be noted that this view is corollary with the view taken by the courts of employee protest of matters beyond the control of management.[118] Issues over which management has no control are like issues over which management historically has had exclusive control[119] in that neither is directly within the recognized sphere of negotiable employer-employee relations. Therefore, the courts, while not entirely prohibiting concerted activity in these areas, will in both instances strictly scrutinize the methods of protest.[120]

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[114] *See* NLRB v. Red Top, Inc., 455 F.2d 721, 728 (8th Cir. 1972) (attempting to replace manager for improper motives is not protected); Socony Mobil Oil Co. v. NLRB, 357 F.2d 662, 664 (2d Cir. 1966) (if complaint is filed in bad faith it is not protected activity); *cf.* Walls Mfg. Co. v. NLRB, 321 F.2d 753, 754 (D.C. Cir. 1963) (letter to sanitation commission protected activity since no intent to maliciously injure the employer).

[115] *See* St. Louis Bagel Bakers, Inc., 224 N.L.R.B. 307, 313 (1976) (walkout by employees refusing to operate a defective machine held protected activity).

[116] For a guide on grievance procedure see B. CRANE & R. HOFFMAN, SUCCESSFUL HANDLING OF LABOR GRIEVANCES (1965).

[117] *See* Getman, *supra* note 3, at 1211-18.

[118] *See* G & W Elec. Specialty Co. v. NLRB, 360 F.2d 873, 876 (7th Cir. 1976) (employee credit union not a matter over which the company had control; nevertheless, discharge of employee who was complaining about credit union held lawful).

[119] See notes 108 through 114 and accompanying text *supra.*

[120] As long as the purpose of the concerted activity is a proper one, "the wisdom of a concerted activity, or the lack of justification therefore is irrelevant to the determination of its status as protected." NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 344 (1938). For example, in NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), the fact that the heater in the plant was being repaired was irrelevant to whether the walkout to protest the extreme cold was protected. *Id.* at 17-19. Therefore, as long as the objective of the employees can be termed for mutual aid or protection, it is a proper subject for protected concerted activity without regard to the good faith actions of the employer. *See generally* Lopatka, *Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees Who Protest Discrimination in Private Employment*, 50 N.Y.U.L. REV. 1179, 1184-95 (1975).

III. Types of Concerted Activities Which Are Protected

The collective bargaining agreement of unionized employees usually defines how grievances are to be presented, and by-passing the established procedures for grievance can result in the loss of section 7 protection for concerted activities that would have been protected otherwise. This principle is vividly illustrated in *Emporium Capwell Co. v. Western Addition Community Organization.*[121] In that case, the Supreme Court denied the protection of the National Labor Relations Act to racial protests by minority employees who had by-passed the union grievance procedures.[122] Although the collective bargaining agreement prohibited racial discrimination, it also established a mechanism for the presentation of complaints.[123] The Court held that the activities were not protected under section 7 because the Act prohibits employees from circumventing use of their elected representative in an attempt to engage in direct bargaining with the employer.[124]

For non-union employees, protected concerted activity generally does not involve an extended use of economic pressure such as a lengthy strike, but, rather, tends to be "a show of feelings rather than an effort to engage in economic combat."[125] Yet, theoretically, because of the absence of a collective bargaining agreement and a representative to speak for them, employees in a non-union plant have more freedom to choose the means of presenting grievances to their employer. In *NLRB v. Washington Aluminum Co.*,[126] the employees of a non-union plant staged a walkout to protest the lack of heat in the plant.[127] The Supreme Court determined that since the employees had no bargaining representative and no established grievance procedure, they were forced to present their grievance through the best means available.[128] Nevertheless, not all such activities are protected. In *Washington Aluminum*, the

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[121] 420 U.S. 50 (1975). *See generally* Cantor, *Dissident Worker Action, After the Emporium*, 29 Rut. L. Rev. 35 (1975); Cassel, *The Emporium Case: Title VII Rights and the Collective Bargaining Process*, 26 Hastings L.J. 1347 (1975); 87 Harv. L. Rev. 656 (1974); 54 N.C.L. Rev. 721 (1976); 27 Vand. L. Rev. 201 (1974).

[122] 420 U.S. at 70.

[123] *Id.* at 53.

[124] *Id.* at 70; *accord*, NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 218 (9th Cir. 1969) (two employees who went on strike without first going through union grievance procedures not protected); Brown v. Sterling Aluminum Prods. Corp., 365 F.2d 651, 656-57 (8th Cir. 1966) (relocation of plant affects union as a whole and only union has right to negotiate); NLRB v. Draper Corp., 145 F.2d 199, 202-03 (4th Cir. 1944) (wildcat strikers not protected when union is carrying on negotiations).

[125] Getman, *supra* note 3, at 1197.

[126] 370 U.S. 9 (1962).

[127] *Id.* at 11-12.

[128] *Id.* at 14.

Court condoned the walkout only because it was not unreasonable, "unlawful, violent or in breach of contract,"[129] nor was it "indefensible".[130]

In addition, of course, the activity must also satisfy the definition of "concerted"[131] and be for the purpose of mutual aid or protection[132] to be entitled to protection. Despite these restrictions, the courts and the Board have held many different types of activity in a non-union context to be protected. Examples include circulating and presenting petitions,[133] writing letters to the employer[134] or to fellow employees,[135] displaying leaflets in the plant,[136] picketing,[137] arranging and assuming leadership roles at meetings to present grievances,[138] individual and group presentation of grievances,[139] strikes and other work stoppages,[140] forming grievance committees,[141] lobbying before the legislature on matters relating to employment,[142] appearing on television to protest em-

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[129] *Id.* at 17.

[130] *Id.*

[131] See section II *supra.*

[132] See section III *supra.*

[133] *See* Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (circulating of and obtaining signatures on petition to correct what employees thought to be inadequacy of working conditions held protected activity); Frank v. Paxton Lumber Co., 235 N.L.R.B. No. 83, 98 L.R.R.M. 1072, 1072 (1978) (employee protected when he presented list of changes in working conditions desired by others to manager); Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 575-76 (1976) (employee protected for drafting petition protesting the discharge of a co-worker).

[134] *See* Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215, 1217 (1977) (employee protected when he wrote letter to board of directors protesting wages).

[135] *See* Empire Gas, Inc., 224 N.L.R.B. 628, 630-31 (1976) (employee's writing letter to co-employees protesting elimination of pay system and urging work stoppages held protected conduct).

[136] *See* International Ass'n of Machinists v. NLRB, 415 F.2d 113, 115 (8th Cir. 1969) (invalidated prohibition of distribution of leaflets in non-working area during off time).

[137] *See, e.g.*, NLRB v. Babcock & Wilcox Co., 498 F.2d 43, 48 (3d Cir. 1974) (peaceful picketing held protected activity); Artware, Inc., 198 F.2d 637, 642 (6th Cir.) (right to strike includes peaceful picketing regardless of resulting damage to employer's business), *cert. denied*, 344 U.S. 897 (1952).

[138] *See* Frank Paxton Lumber Co., 235 N.L.R.B. No. 83, 98 L.R.R.M. 1072, 1072-73 (1978) (employee had group of employees over to his house to prepare a list of grievances).

[139] *See* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1354 (3d Cir. 1969) (protected activity when two employees presented grievance to management concerning latter's failure to contribute to profit sharing plan).

[140] *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 15 (1962) (employees protected when they walked off job because of cold working conditions); NLRB v. Lasaponara & Sons, Inc., 541 F.2d 992, 998 (2d Cir. 1976) (work stoppage to protest having to work on Palm Sunday protected activity).

[141] *See* Columbia Univ., 236 N.L.R.B. No. 84 (1978) (protected activity when employee formed grievance committee to protest unfair policies).

[142] *See* Kaiser Eng'r v. NLRB, 538 F.2d 1379, 1385 (9th Cir. 1976) (engineers who

ployment conditions,[143] writing letters to newspapers,[144] honoring picket lines,[145] and filing a suit[146] or a complaint with a state or federal agency against the employer.[147]

As has been indicated, the techniques by which employee dissatisfaction can be expressed are myriad. Nevertheless, the single most powerful weapon at the disposal of employees is the strike. A strike may be defined as a voluntary refusal on the part of employees to work as a response to management's failure to agree to an employee demand.[148] If the strike is lawful, it may not be construed as a repudiation of the employment relationship; under the Act, strikers remain employees for remedial purposes.[149] However, if a strike has an illegal purpose or loses its protection for any other reason, the strikers are considered to have forfeited their status as employees and are not entitled to reinstatement.[150] Not only does the law distinguish between legal and illegal

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lobbied legislators regarding changes in national policy affecting their job security were protected); Bethlehem Shipbldg. Corp. v. NLRB, 114 F.2d 930, 937 (1st Cir. 1940) (the right of self organization includes appearance before legislative committees).

[143] *See* Community Hosp. of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 610 (4th Cir. 1976) (nurse protected when she appeared on television and gave statements concerning the number of nurses employed and wages).

[144] *See* Reading Hosp. & Medical Center, 226 N.L.R.B. 611, 614 (1976) (employee cannot be discharged for openly considering writing a letter to a newspaper about working conditions in a hospital).

[145] *See* Kellog Co. v. NLRB, 457 F.2d 519, 522 (6th Cir. 1972) (employees protected when they honored picket line of another union); William S. Carroll, Inc., 232 N.L.R.B. No. 148 (1977) (employee protected even though his failure to cross picket line caused employer to lose some business); Wheeling Elec. Co., 182 N.L.R.B. 218, 222 (1970) (refusing to cross picket line is protected activity).

[146] *See* Altex Ready Mixed Concrete Corp. v. NLRB, 542 F.2d 295, 297 (5th Cir. 1976) (filing a labor-related civil action in good faith was a protected activity); Leviton Mfg. Co. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973) (labor-related civil action is protected if brought in good faith); Ambulance Serv. of New Bedford, Inc., 229 N.L.R.B. 106, 109-10 (1977) (employee's filing suit to recover wages owed when employer's check bounced held protected activity).

[147] *See* NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582 (5th Cir. 1967) (filing unfair labor practice charges is protected activity); Nash v. Florida Indus. Comm'n, 205 So. 2d 700, 703 (Fla.) (employer may not hinder employee who wishes to file unfair labor practice charges), *aff'd*, 389 U.S. 235 (1967); G.V.R., Inc., 201 N.L.R.B. 147, 153-54 (1974) (employee protected when he told government interviewers that employer required kickbacks on government contract job).

[148] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 256 (1939).

[149] *Id.* at 256; *see* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 347 (1938) (strike in connection with a current labor dispute is not renunciation of employment relation).

[150] *See* Southern Steamship Co. v. NLRB, 316 U.S. 31, 48 (1942) (employees striking in violation of federal mutiny laws not entitled to reinstatement); NLRB v. Blades Mfg. Corp., 344 F.2d 998, 1004 (8th Cir. 1965) (illegal strikes are not protected, citing NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962)).

strikes, it further differentiates between two categories of legal strikers. When the strike is actuated by such typical concerns as wages or employment terms and conditions, generally in a non-union context, the employees are considered economic strikers. Economic strikers are entitled to reinstatement only if permanent replacements have not been hired during the strike.[151] In contradistinction, workers protesting unfair labor practices by management, such as failure to bargain in good faith,[152] are viewed as unfair-labor-practice strikers and are entitled to unconditional reinstatement.[153] Thus, neither strikes nor strikers are of a single species. It is therefore essential that both labor and management properly characterize the nature of the strike in which they are involved in order to define clearly the respective rights of each side.

Moreover, it must be noted that a strike is a double-edged sword. The infliction of economic injury flows in both directions. It is true that management's productivity may be substantially impaired, if not entirely destroyed, by a strike. It is equally true that an employee has no right to be paid while he is striking.[154] This latter fact certainly militates against frivolous or unreasonably lengthy strikes.

Furthermore, the principle is deeply imbedded in our common law tradition that rights do not exist independently of responsibilities.[155] In addition, the federal regulatory scheme that the NLRB sought to inculcate was designed to establish relative equality in bargaining power between labor and management. Thus, if the employer can fill positions during a strike, he should be free to do so. Moreover, employees should

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[151] First Nat'l Bank v. NLRB, 413 F.2d 921, 925 (8th Cir. 1969).

[152] *See* Adams Potato Chips, Inc. v. NLRB, 430 F.2d 90, 91 (6th Cir.) (employers must bargain in good faith with their employees about "wages, hours, and other terms and conditions of employment"), *cert. denied*, 401 U.S. 975 (1970). *See also* 29 U.S.C. § 158(d) (1976).

[153] *See generally* NLRB v. Shenandoah-Dives Mining Co., 145 F.2d 542, 547 (10th Cir. 1944) (enforced order requiring employer to reinstate striking employees when their positions had been filled by unfair labor practice since their replacements were hired after strike had terminated); Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 319 n.3 (1953).

[154] *See* NLRB v. Montgomery Ward & Co., 157 F.2d 486, 496 (8th Cir. 1946) (though employees undoubtedly had right to strike they could not continue to work, accept wages, and refuse to do work at employer's damage); C.G. Conn, Std. v. NLRB, 108 F.2d 390, 396-97 (7th Cir. 1939) (employee cannot be on strike and at work simultaneously); John S. Swift Co., 124 N.L.R.B. 394, 396-97 (1959) (employees may not work regular hours and then "strike" after hours to avoid overtime work).

[155] Cone Mill Corp. v. NLRB, 413 F.2d 445 (4th Cir. 1969). "Few rights, including the right to strike in protest, exist without corresponding duties and obligations to those against whom the right is being asserted. When one attempts to exercise a claimed right, he cannot, in all fairness, disregard his corresponding duty and obligation with impunity." *Id.* at 454.

not be free to enjoy the benefits of employment without accepting the duties of being employed. Therefore, employees who engage in an in-plant work stoppage and who refuse either to resume their work or to leave the plant can be lawfully discharged.[156] Similarly, slow-downs[157] and sporadic work-stoppages are not protected.[158] The logic supporting this rule has two components. First, the ability to engage in "partial strikes" tilts the legislatively-mandated balance of power too far in the favor of labor.[159] Second, it is unjust to accept the benefits of employment without accepting the commensurate responsibilities of being an employee—preimminently, the duty to work for the person that pays one's salary. In addition, the "partial strike" subjects the employer to potentially devastating economic damage with no countervailing threat to employees. It is, therefore, hardly astonishing that "partial strikes" are generally not protected.[160]

Although most strikes are called by unions, strikes by non-unionized workers are also protected within the limitations previously

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[156] *Id.* at 454.

[157] *See* Glass Guard Indus., Inc., 218 N.L.R.B. 176, 185 (1975) (employees validly discharged for engaging in slow-down). Though slow downs would obviously be effective for employees, there is a general attitude of public condemnation of occupying a job and receiving pay while refusing to perform. Cox, *supra* note 153, at 338. *But see* Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activity*, 47 TEX. L. REV. 378, 379-82 (1969) (advocating the protection of partial strikes).

[158] *See* Automobile Workers v. Wisconsin Employment Relation Bd., 336 U.S. 245, 264-65 (1949) (state employment agency may prohibit intermittent, unannounced work stoppages); Cincinnati Gasket, Packing & Mfg., Inc., 146 N.L.R.B. 851, 863-64 (1964) (discussing union during working hours and refusing to work overtime had a detrimental effect on production and was not protected); Pacific Tel. & Tel. Co., 107 N.L.R.B. 1547, 1549-50 (1952) (hit and run work stoppages not protected).

[159] *See* Cox, *supra* note 153, at 339. "Slowdowns and similar disobedience on the job cost the employees nothing and, if they were protected activities, management would be helpless to resist. Hence such weapons are too effective to permit them to be part of the employee's arsenal." *Id.*

[160] *See* Getman, *supra* note 3, at 1231-38. The theory underlying nonprotection for partial strikes was summarized by the Eighth Circuit:

> Employees may seek to change any term or condition of their employment and their ultimate sanction is a strike . . . . [W]hat makes any work stoppage unprotected . . . [is] . . . the refusal or failure of the employee to assume the status of strikers, with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute . . . may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working . . . . A work stoppage does not lose its presumptive protection merely because it is limited in duration. If employees have not been replaced while they were away from work, they must be reinstated when they offer to return.

First Nat'l Bank v. NLRB, 413 F.2d 921, 923-24 (8th Cir. 1964). *But see* Schatzki, *supra* note 157, at 379-82.

indicated. In one leading case, *First National Bank v. NLRB,*[161] non-union employees ceased working at the end of their regular shift to protest excessive overtime demands by the employer.[162] Relying on the doctrine that workers cannot simultaneously be on strike and expect to continue to work for pay, management refused to permit the "strikers" to return to work during ordinary hours.[163] Nevertheless, the Eighth Circuit declared this wholesale firing to be illegal. The court reasoned that since the strike was in itself a protected concerted activity, the fact that it took place at the end of the work day did not strip it of its protected status.[164] Furthermore, since the employees were not unionized, they had not by collective bargaining established channels through which protests could be registered, and had therefore not violated the terms of a collectively-bargained-for agreement.[165] Thus, management could legally discharge only those economic strikers for whom it had found replacements during the course of the strike.[166]

In *First National Bank*, the employee action was essentially what might be termed a symbolic strike. This sort of strike, being a singular and isolated event, is not intended to inflict serious economic damage upon the employer but rather graphically to bring to the employers' attention the grievance of the workers. Such activities are generally presumed to be strikes protected under section 7, especially if the workers are not unionized and therefore have no bargained-for procedures for expressing worker dissatisfaction.[167] This presumption may, however, be rebutted by evidence that the work stoppage is part of an on-going scheme for future intermittent "strikes." Under the latter circumstances, the employees' behavior is no longer consistent with their duty either to assume the status of bona fide strikers or to resume working.[168]

Nevertheless, if workers have no established grievance procedures,[169] short spontaneous work stoppages may be protected[170] so long

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[161] 413 F.2d 921 (8th Cir. 1969).

[162] *Id.* at 923.

[163] *Id.*

[164] *Id.* at 925-26.

[165] *Id.* at 926. The court distinguished these circumstances from the facts in NLRB v. R.C. Can Co., 328 F.2d 974, 979 (5th Cir. 1964), where the employees were in the process of negotiating a new contract when a "wildcat strike" occurred. *Id.*

[166] *Id.* at 925.

[167] Polytech, Inc., 195 N.L.R.B. 695, 696 (1972); *see* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (spontaneous walkout by seven employees acting without a designated representative to protest cold working conditions not protected).

[168] 195 N.L.R.B. at 696.

[169] *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962).

[170] *See* NLRB v. Pepsi Cola Bottling Co., 449 F.2d 824, 827-30 (5th Cir. 1971) (peaceful sit-down of 97 employees protected). *See also* Stewart Die Casting Corp. v. NLRB, 114

as there are no threats or acts of violence and the work place is not seized.[171] Moreover, in accordance with the principle that unorganized workers must express their dissatisfaction as best they can,[172] such employees are entitled to remain on company property in order to bring their grievance to the attention of management. Of course, the work stoppage must be of brief duration and may not be part of an intended pattern of periodic refusals to work.[173] In addition, even where there is an extant grievance procedure, it may with impunity be circumvented by the workers if it was unilaterally promulgated by management.[174] Thus, the employer may not protect itself from unauthorized expressions of worker dissatisfaction by establishing on its own arbitrary and unreasonably narrow means through which protests can be registered.

Obviously, the purpose of a strike is to bring economic pressure to bear on the employer. Yet, since the exercise of section 7 rights overbalances any loss occasioned by a short term interruption of production, adverse economic impact upon the company does not deprive the work stoppage of protection.[175] Nevertheless, if the impact is significant or if misconduct is involved, protection may be forfeited.[176] In addition, as a general rule, a strike may not retain its protected status if it inflicts economic harm upon the company without simultaneously conferring some compensatory gain upon workers.[177] Consequently, wanton and

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F.2d 849, 855-56 (7th Cir. 1940) (since employer treated employees who staged a sit-down the same as strikers of a subsequent strike those in the sit-down were protected), *cert. denied*, 312 U.S. 680 (1941).

[171] *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 248-51 (1939).

[172] NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-15 (1962).

[173] *See* Crenlo v. NLRB, 529 F.2d 201, 204 (8th Cir. 1975) (nonviolent legitimate work stoppage protected); NLRB v. J.I. Case Co., 198 F.2d 919, 922 (8th Cir. 1952) (employees retain protection for stoppage to present grievance); NLRB v. Kennametal, Inc., 182 F.2d 817, 819 (3d Cir. 1950) (employees have right to meet with management to present grievances).

[174] *See* Essex Int'l, 213 N.L.R.B. 260, 266-67 (1974) (refusal of employees to return to work until allegedly defective equipment was repaired was protected activity even though the employees did not utilize the grievance procedure set up unilaterally by the employer).

[175] *See* Crenlo v. NLRB, 529 F.2d 201, 204 (8th Cir. 1975) (shutdown of work for approximately one hour to compel management to discuss pay raise was protected); Columbia Univ., 236 N.L.R.B. No. 84, 98 L.R.R.M. 1353 (1978) (shortlived interruption of services to protest the discharge of employee was protected activity).

[176] *See* AMP, Inc., 218 N.L.R.B. 33, 36 (1975) (discharge of employee for protesting the firing of another employee unlawful despite fact that employee closed production to make protest). For an application of the principle see Columbia Univ., 236 N.L.R.B. No. 84, 98 L.R.R.M. 1353 (1978). *But see* NLRB v. Lasaponara & Sons, 541 F.2d 992, 998 (2d Cir. 1976) (concerted refusal to work on religious holiday as protest of holiday work protected even though employer suffered heavy economic loss because of heavy holiday production schedule).

[177] NLRB v. Lasaponara & Sons, 541 F.2d 992, 998 (2d Cir. 1976); *see* Dobbs House,

purely punitive strikes are not protected.

The strike is, as previously indicated, the most powerful weapon in the arsenal of section 7 rights.[178] Yet, in a non-union context, a prolonged strike is rarely fruitful and therefore seldom used. Like letters, petitions, and meetings, strikes by non-union workers are generally utilized as a means of expressing employee sentiment rather than as an economic weapon.

A matter closely related to the right to strike is the right to honor lawful picket lines.[179] As a general rule, the picket line the employee refuses to cross must be lawfully protected under the Act in order for the employee's refusal, in turn, to be protected.[180] The scope of this protection is not as substantial as might be expected. Indeed, the employer may permanently replace, but may not discharge, an employee who refuses to cross a picket line. The employer must, however, establish that the refusal to work substantially interfered with the employer's business operations and that this disruption could not be remedied by merely assigning the recalcitrant employee's work to another employee.[181] One cannot help but wonder if the nicety of this distinction between replacement and discharge is not a distinction without a difference.[181.1]

Inc. v. NLRB, 325 F.2d 531, 532 (5th Cir. 1963) (departure of waitresses at dinner hour unprotected). An example of unprotected activity was a strike timed to coincide with the moment when molten iron was ready to be poured off at a foundry, and lack of sufficient help to carry out the operation could have caused substantial property damage and loss to the employer. NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 411 (5th Cir. 1955).

[178] *See* NLRB v. Insurance Agents' Union, 361 U.S. 477, 489 (1960) (use of economic weapons often induces one to come to terms desired by another); McGraw Lab., 206 N.L.R.B. 602, 604 (1973) (a strike to bring pressure upon an employer to change terms and conditions of employment is an economic weapon designed to cause the employer to meet the demands of the strikers).

[179] See note 28 *supra*.

[180] Illustrative of this point is Capital Times Co., 234 N.L.R.B. No. 62, 97 L.R.R.M. 1184 (1978), where the Board considered a situation in which an employee had honored a picket line set up by state employees. Since state employees are not covered by the Act, they are not defined as "employees." The Board, in upholding the right of the employer to discipline the employee, stated: "An employee cannot engage in concerted activities within the meaning of section seven with nonemployees who are not entitled to the protection of the Act." *Id.*

[181] Overnite Transp. Co., 154 N.L.R.B. 1271, 1274-75 (1965); Redwing Carriers, Inc., 137 N.L.R.B. 1545, 1547 (1962).

[181.1] That the discharge-replacement distinction is a distinction without a difference has not been unremarked. *See* Schatzki, *supra* note 157, at 382-92. This distinction has also been criticized by the Supreme Court. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 75 (1952). *See generally* R. GORMAN, LABOR LAW 353-54 (1976).

IV. Circumstances Which Cause the Loss of Protection Under Section 7

Although the activities discussed above are usually protected, there are circumstances which, if present, deprive these activities of protection. For the purposes of this article, such circumstances will be categorized as follows: (1) disloyalty; (2) use of unreasonable means; (3) disruption of business; (4) threats, violence or illegal conduct; and (5) opprobrious, egregious or flagrant conduct.[182]

A. Disloyalty

Although it has been stated that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer,"[183] this blanket condemnation is so broad that it is not so clear as it might seem.[184] The problem is further compounded by the propensity of both the Board and the courts to decide similar cases in different ways on the basis of minor factual differences.[185] Nonetheless, since disloyalty removes the cloak of section 7 protection from employee actions, the labor attorney should be aware of the situation in which such acts have been found to violate the duty of loyalty owed to the employer.

In *NLRB v. Knuth Brothers, Inc.*,[186] a union employee in a non-union, subcontractor plant ignored orders from the prime contractor and directly communicated with the ultimate customer to inform the consumer that a non-union plant had been awarded the subcontract.[187] The Seventh Circuit rejected the employee's contention that his actions were protected, since he had acted in reckless disregard of Knuth Brothers'

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[182] *See generally* Gregory, *Unprotected Activity and the NLRA*, 39 Va. L. Rev. 421 (1953).

[183] NLRB v. Local 1229, I.B.E.W., 346 U.S. 464, 472 (1953).

[184] Disloyalty can include anything from interference with employer's business relations and breach of confidence to the dissemination of maliciously false statements. *See* NLRB v. Local 1229, I.B.E.W., 346 U.S. 464, 477 (1953) (distribution of malicious leaflets to public held to constitute disloyalty); NLRB v. Knuth Bros., Inc., 537 F.2d 950, 952 (7th Cir. 1976) (interference with employer's business relations through a breach of confidence is disloyalty).

[185] *Compare* NLRB v. Local 1229, I.B.E.W., 346 U.S. 464, 477 (1953) (distribution of malicious leaflets to public held to be disloyalty) *and* NLRB v. Knuth Bros. Inc., 537 F.2d 950, 952 (7th Cir. 1976) (contact of ultimate consumer despite contractor's orders held to constitute disloyalty) *with* NLRB v. Circle Bindery, Inc., 536 F.2d 447, 450 (1st Cir. 1976) (activity held not to be disloyalty where union member in non-union plant had union officials contact ultimate consumer) *and* American Hosp. Ass'n, 230 N.L.R.B. 54, 56-57 (1977) (distribution of grievance leaflets on plant grounds held not disloyalty).

[186] 537 F.2d 950 (7th Cir. 1976).

[187] *Id.* at 952.

rights by tampering with its business relationships.[188] As a result of this disloyalty, the employee's discharge was upheld.[189]

Knuth Brothers involved elements of breach of confidence in that the employee deliberately disobeyed the order from the prime not to reveal the non-union status of the subcontractor.[190] Even though employees are generally entitled to use any information that comes to their attention in the normal course of work, if the information is confidential in nature, it may not be disclosed.[191] On the other hand, in *Jeanette Corp.*,[192] an employer's rule that salary information be kept confidential did not remove protection from an employee's discussion of wage rates with other employees for the purpose of seeking raises for herself and other clericals.[193] This holding is, however, clearly consistent with the general rule that an employer's policy cannot inhibit protected concerted activity.[194]

Although an employee who deliberately makes false or malicious statements about the employer could well be subject to discharge or discipline,[195] a good faith defense appears to be available to employees

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[188] *Id.* at 956.

[189] *Id.*; Comment, *NLRB v. Knuth Brothers: The Boundaries of Unprotected Disloyalty When a Non-Striking Employee's Section 7 Concerted Activity Threatens Employer-Customers Relations*, 125 U. PA. L. REV. 1339 (1977).

This case should be contrasted with NLRB v. Circle Bindery, Inc., 536 F.2d 447 (1st Cir. 1976) in which the court held that similar acts did not constitute disloyalty. The only distinction between the two cases is the fact that in *Circle Bindery* the employee told a union representative who in turn informed the customer of the fact that a non-union plant was working on the job, instead of calling the customer himself, as was done in *Knuth Brothers. Id.* at 450.

[190] 537 F.2d at 952.

[191] Ridgley Mfg. Co., 207 N.L.R.B. 193, 196-97 (1973), *enforced*, 510 F.2d 185 (D.C. Cir. 1975). A question may arise concerning what confidential material is. *Compare* Murray-Ohio Mfg. Co., 148 N.L.R.B. 1541, 1550 (1964) (lists of employees obtained from timekeepers to aid union organization were not confidential), *enforced*, 358 F.2d 948 (6th Cir. 1966) *with* Farlow Rubber Supply, Inc., 193 N.L.R.B. 570, 573 (1971) (confidentiality evidenced by fact that the information was kept in a fireproof vault).

[192] 217 N.L.R.B. 653 (1975), *enforced*, 532 F.2d 916 (3d Cir. 1976).

[193] 217 N.L.R.B. at 656. The court reasoned that the employer's prohibition of employees' discussing wage rates among themselves was clearly an impediment to protected concerted activity. *Id.*

[194] *See* Transportation Lease Serv., Inc., 232 N.L.R.B. No. 21, 96 L.R.R.M. 1254 (1977) (Act proscribes any employer's inhibition of employees' exercise of protected concerted activity). Illustrative of this proposition is the case of Howard Mfg. Co., 227 N.L.R.B. 1858 (1977), in which it was found that a walkout that was otherwise protected did not lose its protection because of the employer's rule that employees could not leave their stations without permission. *Id.* at 1865.

[195] *See, e.g.*, NLRB v. Local 1229, I.B.E.W., 346 U.S. 464, 477 (1953) (malicious leaflets to public held to constitute disloyalty); Indiana Gearworks v. NLRB, 371 F.2d 273, 275 (7th Cir. 1967) (malicious cartoons posted in plant held unprotected).

whose protests are based on false information. The Board has stated that "[e]mployees do not forfeit the protection of the Act if, in voicing their dissatisfaction with matters of common concern, they give currency to inaccurate information provided it is not deliberately or maliciously false."[196] Therefore, employees have been protected when they filed suit against their employer even though the suit was found to be groundless, because it was filed in good faith and was thus not prompted by malice.[197] Since the test for this aspect of disloyalty is the presence of malice, each case will turn on its particular facts.[198]

Since virtually all activities protected under section 7 are, at least arguably, acts of disloyalty to the employer, the courts are forced to apply some sort of balancing test as between these competing rights. Thus, the courts will deny section 7 protection only upon a showing that the disloyalty is so egregious that it overshadows the employees' rights under the Act.[199]

B. Unreasonable Means to the End

In order for the activity to be protected, the type of concerted activity used must be reasonably related to the ends sought to be achieved.

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[196] Walls Mfg. Co., 137 N.L.R.B. 1317, 1319 (1962), *enforced*, 321 F.2d 753 (1963), *cert. denied*, 375 U.S. 923 (1963). *See also* Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (distribution of handbill that contained only two minor errors was not so distorted as to show malicious intent).

[197] Trinity Trucking & Materials Corp., 221 N.L.R.B. 364, 365 (1975), *supplemented*, 227 N.L.R.B. 792 (1977); *see* Marlin Firearms Co., 116 N.L.R.B. 1834, 1834-40 (1962) (employee protected since statements were not made with intent to maliciously injure the employer).

[198] In NLRB v. Local 1229, I.B.E.W., 346 U.S. 464 (1953), public distribution of leaflets disparaging the employer was held to be disloyal and indefensible. *Id.* at 477. Similarly, in Indiana Gearworks v. NLRB, 371 F.2d 273 (7th Cir. 1967), the display of cartoons maliciously ridiculing management was held to be unprotected. *Id.* at 275.

Yet in National Hosp. Ass'n, 230 N.L.R.B. 54 (1977), the Board extended protection to the distribution of protest leaflets that contained sarcastic and insulting material on the ground that the employees were seeking to change what they believed were inappropriate management decisions and were not maliciously seeking to harm the company. *See also* Tower Foods, Inc., 221 N.L.R.B. 1260, 1267 (1975) (distribution of letter to co-employees accusing employer of incompetence, lack of foresight, racial discrimination, and favoritism in hiring and firing held protected activity); *cf.* NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 63-64 (1964) (strikers may appeal to the customer's sympathy by encouraging them to boycott employer's product for the duration of strike).

[199] *See* Getman, *supra* note 3, at 1238-40.

Perhaps the Supreme Court said it best in the case NLRB v. Local 1229, I.B.E.W., 346 U.S. 464 (1953). "[The] activities [were] characterized as 'indefensible' because they were found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities." *Id.* at 477.

The landmark decision in this area is *NLRB v. Washington Aluminum Co.*[200] In that case employees staged a walkout to protest the extreme cold in the shop. The Supreme Court stated that since the employees had "no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer . . . they had to speak for themselves, as best they could."[201] The Court noted the absence of an established procedure to present grievances to the company, and stated that when circumstances were considered in view of the extremely cold conditions, the concerted activity of the men in leaving their jobs was a perfectly natural and reasonable thing to do.[202] The Court concluded that:

> [Section] 7 does not protect all concerted activities . . . . The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those which are unlawful, violent, or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities . . . . Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.[203]

In such a case, a spontaneous walkout is protected regardless of whether the employees make their demands before, during or after the concerted activity.[204]

The walkout in *Washington Aluminum* should be contrasted with cases in which the courts determined that a walkout was an unreasonable and therefore unprotected means to the end sought by the workers. In *Dobbs House, Inc. v. NLRB*,[205] the employer's waitresses were discharged for leaving the restaurant in order to protest the apparent discharge of a supervisor. The Fifth Circuit stated that although concerted activity in protest of a change in supervisory personnel is protected when the supervisory position in question is directly related to the employees'

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[200] 370 U.S. 9 (1962).

[201] *Id.* at 14.

[202] *Id.* at 16.

[203] *Id.* at 17 (footnotes omitted).

[204] *Id.* at 14; *accord*, Electronic Design & Dev. Co. v. NLRB, 409 F.2d 631, 634 (9th Cir. 1969).

[205] 325 F.2d 531 (5th Cir. 1963).

own employment,[206] the method of protest used must be reasonably related to the desired goal.[207] The court then held that since the departure en masse of the waitresses at the dinner hour was not a reasonable method of protesting the supervisor's discharge, the concerted activity had lost its protection.[208]

As a comparison of *Washington Aluminum* and *Dobbs House* reveals, reasonableness of employee actions depends largely upon the nature of the goal the employees hope to achieve through their actions. As long as their purpose is to protest matters that are of direct concern to them, greater leeway will be allowed to the employees' choice of methods. However, as the object of the protest approaches matters traditionally within the discretion of management, the means used must be ever more reasonable, and, at some point, at least by inference, must involve only expressions of sentiment, not economic pressure on the employer.[209]

C. *Disruption of Business*

The right of employees to engage in protected concerted activity must be balanced against the employer's right to maintain order and control in the plant. *Southwestern Bell Telephone Co.*,[210] illustrates this principle well. Some of the employees of the Telephone Company began wearing sweatshirts displaying the slogan "Ma Bell is a Cheap Mother" in protest of the employer's wage offers made in the context of collective bargaining. The employer directed the employees to remove or to cover the shirts during work time.[211] No violation of section 8(a)(1) was found because this demand by the employer was determined to be reasonable

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[206] *Id.* at 537. *Compare* NLRB v. Ford Radio & Mica Corp., 258 F.2d 457, 463 (2d Cir. 1958) (concerted activity to influence the hiring, firing or conditions of employment of supervisory personnel is unprotected) *and* NLRB v. Coal Creek Coal Co., 204 F.2d 579, 582 (10th Cir. 1953) (strike to protest discharge of a supervisor is not concerted activity for mutual aid or protection) *with* NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8, 12 (6th Cir. 1960) (protesting the appointment of an unqualified foreman held protected activity since it would adversely effect employees' jobs) *and* NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir. 1948) (discharge of employees for protesting the hiring of an incompetent cashier unlawful).

[207] 325 F.2d at 539.

[208] *Id.* Of similar import is the case Henning & Cheadle, Inc. v. NLRB, 522 F.2d 1050 (7th Cir. 1975), where employees had walked off the job to protest the firing of a supervisor. The court found that, because of important departmental deadlines, the activity was not a reasonable method for the employees' use in communicating their concern to the employer. The walkout was therefore unprotected such that the employees were subject to discipline. *Id.* at 1055.

[209] *See* Getman, *supra* note 3, at 1211.

[210] 200 N.L.R.B. 667 (1972), *noted in* 74 COLUM. L. REV. 117 (1974).

[211] 200 N.L.R.B. at 667-68.

and necessary to maintain discipline and harmonious employee-employer relations in the operation of the business.[212] The Board held that in view of the controversial nature of the language and the fact that it was subject to a profane construction, the employer could legitimately ban the shirts as a reasonable precaution against discord and bitterness between the employees and management, and to assure decorum and discipline in the plant.[213]

In contrast to the *Southwestern Bell* case, a grievance meeting was held to be protected in *NLRB v. Sutherland Lumber Co.*[214] even though it lasted thirty minutes, and even though the discussion was loud, heated, and replete with earthy expressions. There were customers in the yard adjoining the shed in which the meeting was being held, and one customer came to the shed to find out what was going on.[215] The employer argued that these circumstances constituted a disruption of his business. However, the court found that the type of language used was used by others in the yard and was condoned by the company, and that the meeting did not constitute a disruption of business.[216]

D. Threats, Violence, or Illegal Conduct

A strike in violation of law is not protected. In *Southern Steamship Co. v. NLRB*,[217] a strike that violated mutiny laws was held unprotected;[218] similarly, in *The American News Co.*,[219] a strike to force a wage increase prior to its approval by the War Labor Board was held to be unprotected.[220]

There will certainly be situations, however, when the strike, al-

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[212] *Id.* at 671; *accord*, Caterpillar Tractor Co. v. NLRB, 230 F.2d 357, 358-59 (7th Cir. 1956) (upheld employer's ban on badges bearing "Don't be a scab"); Boeing Airplane Co. v. NLRB, 217 F.2d 369, 374-75 (9th Cir. 1954) (bar of union buttons was legitimate in a "highly explosive" rival union situation). *But cf.* NLRB v. Mayrath Co., 319 F.2d 424, 426-27 (7th Cir. 1963) (sanctioned the use of insignia which did not interfere with discipline).

[213] 200 N.L.R.B. at 671.

[214] 452 F.2d 67 (7th Cir. 1971).

[215] *Id.* at 69-70.

[216] *Id. Compare* American Hosp. Ass'n, 230 N.L.R.B. 54, 57 (1977) (distribution of publication by employees that criticized management policies was not inherently disruptive of discipline, nor was it offensive, obscene, or obnoxious) *with* Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215, 1217 (1977) (employee's phone call protesting working conditions was protected though made outside normal chain of authority and may have jeopardized employer's relationship with another institution).

[217] 316 U.S. 31 (1942).

[218] *Id.* at 40.

[219] 55 N.L.R.B. 1302 (1944).

[220] *Id.* at 1305.

though replete with threats and acts of violence, does not itself violate any specific law. In such a situation, only those employees who have engaged in illegal acts will lose their section 7 protection.[221] The landmark case in this area is *NLRB v. Fansteel Metallurgical Corp.*[222] The activity in question in the *Fansteel* case was a sit-down strike during which employees seized and retained possession of the company's property for a period of several days and committed various acts of violence.[223] The Court held that depriving the employer of its right to possession of its property was an unlawful act, no matter how reprehensible the employer's pre-strike conduct might have been.[224] The Supreme Court stated that "[t]o justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society."[225]

E. Opprobrious, Egregious or Flagrant Conduct

Behavior of this type generally arises during a discussion of grievances. Employees forfeit section 7 protection only in "flagrant cases in which misconduct is so violent or of such nature as to render the employee unfit for further service."[226] The standard for determining whether statements or conduct by employees at a grievance meeting are so opprobrious as to remove the protection of the Act is guided by the same principles applicable to a debate during collective bargaining. Thus frank, if not always complimentary, exchanges of views must be expected if such sessions are to be natural and not stilted.[227] Probably the best description of what constitutes unprotected behavior comes from the case of *NLRB v. Red Top, Inc.*[228] In upholding the discharge

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[221] *See* NLRB v. Thayer Co., 213 F.2d 748, 757 (1st Cir. 1954) (only those employees who visited homes of non-striking employees and threatened them to respect picket line were not entitled to reinstatement).

[222] 306 U.S. 240 (1939).

[223] *Id.* at 248-49.

[224] *Id.* at 253-54.

[225] *Id.* at 253. *But see* Republic Creosoting Co., 19 N.L.R.B. 267 (1940), in which the Board recognized that conduct on the picket line must be viewed tolerantly because of the friction that usually results from industrial confrontation. "[T]he emotional tension of a strike almost inevitably gives rise to a certain amount of disorder and . . . conduct on a picket line cannot be expected to approach the etiquette of the drawing room or breakfast table." *Id.* at 288.

[226] Firch Bakery Co., 232 N.L.R.B. No. 120, 97 L.R.R.M. 1192, 1193 (1977) (quoting Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948)).

[227] *See* Crown Central Pet. Corp., 177 N.L.R.B. 322, 323 (1969) (reprimand and suspension of two employees for accusing a company official of lying during a grievance proceeding was unlawful).

[228] 455 F.2d 721 (8th Cir. 1972).

of certain employees, the court found that the employees had been

> [I]nsolent, insubordinate, and intimidating; they utilized false charges, threats of physical violence and threats of activity detrimental to the welfare of the business operation . . . . It is of course understandable that tempers may flare in the course of grievance meetings and that harsh and rough words may be exchanged between the parties without giving rise to a basis for discharge consistent with the protections afforded under §7 of the Act. The use of the term egregious to denote the adjectival type of conduct warranting a basis for discharge is general in nature but appears on this record to be an apt description of the activities of the three committee members who were discharged. Egregious is defined in Webster's New World Dictionary as "outstanding for undesirable qualities; remarkably bad; flagrant." We agree . . . that the conduct was insulting, threatening and disloyal to the employer's interests; we also view such conduct as flagrant.[229]

The misconduct at the meeting must generally be of a continuous nature; thus an isolated expletive[230] or a question regarding management "pay offs"[231] is not sufficient to justify discharge of the employee. The courts are again faced with a balancing test in these cases since the probability of impulsive behavior by employees during the exercise of their rights[232] must be viewed in light of the employer's right to maintain order and respect.[233]

CONCLUSION

All employers should be well aware of the obligations they owe to

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[229] *Id.* at 727-28.

[230] *See* Browning Indus. Venetian Marble, 213 N.L.R.B. 269, 272 (1974) (employee who responded "piece work my ass" to efforts of management to put employees on a piecework basis was held to be engaged in protected activity as a spokesman for other employees); Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527, 533 (1948) (discharge of employee for calling employer a crook and a liar during a mass negotiating session between employer and employees held unlawful).

[231] NLRB v. Ben Perkin Corp., 452 F.2d 205, 207 (7th Cir. 1971).

[232] *See* Longview Furniture Co., 100 N.L.R.B. 301 (1952) where the Board stated:

> [T]he language of these employees . . . must be regarded as an integral and inseparable part of their [protected concerted activity] . . . . [T]o suggest that employees in the exercise of their rights and in the heat of picket line animosity must trim their expression of disapproval to some point short of utterances here in question, would be to ignore the industrial realities of speech in a workaday world and to impose a serious stricture on employees in the exercise of their rights under the Act.

Id. at 304.

[233] NLRB v. Thor Power Co., 351 F.2d 584, 587 (7th Cir. 1965).

their employees under statutes such as Title VII of the Civil Rights Act[234] and the Fair Labor Standards Act.[235] However, unless their employees are unionized or have been approached by a union, few employers realize that they have obligations under the National Labor Relations Act as well. It is hoped that this Article has made clear some of the limitations the Act places on the rights of an employer in a non-union context. Nonetheless, one final caveat must also be adduced. When an employer becomes aware that protected concerted activity is taking place in his plant, he should be aware of both the legal and the practical consequences of suppressing such activity. A minor grievance may be only the tip of the iceberg. The dissatisfaction may be the beginning of union organizational activity, or it may be nothing more than it appears to be. In either case, the employer should deal with the situation circumspectly and redress any grievance his employees may have to the best of his ability without taking adverse action against them and without exhibiting animosity toward them. Retaliating against employees who engage in protected concerted activity, in addition to violating their legal rights, will compound whatever grievance the employees have and may lead to more demonstrations of dissatisfaction. A disgruntled workforce tends to favor unionization and economic retaliation against the employer more often than does a workforce with whom the employer has maintained a good relationship. Therefore, by suppressing the rights of his employees, the employer may not only subject himself to legal liability but may well endanger his coveted status as a non-union employer.

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[234] 42 U.S.C. § 2000e (1976).

[235] 29 U.S.C. §§ 201-219 (1976).

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COMMENTS

IN SEARCH OF A HABITABLE HOME IN MISSISSIPPI

The concern for adequate housing for Mississippians is not a recent phenomenon. In 1937, the Mississippi State Planning Commission noted that "[t]he type and condition of houses occupied by many of the southern tenants is an indictment of our civilization."[1] More recently, numerous state and local government officials have joined the "housing movement"—assessing housing needs,[2] developing housing programs,[3] and expending local, state and federal monies[4] to rehabilitate or eliminate substandard[5] housing, to relocate displaced inhabitants,[6] and to build new housing to meet the state's projected need of 854,420 housing units by 1980.[7] But housing needs are not met simply by the provision of additional housing: the most crucial housing problem is the need for a method by which tenants may require their landlords to provide habitable dwellings. In Mississippi, more than thirty-three per cent of all houses are occupied by tenants.[8] Of these houses, almost thirty-eight per cent are classified as substandard.[9] If action is not taken

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[1] Mississippi State Planning Comm'n, Farm Tenancy in Mississippi, Release No. 7, at 23 (March 1, 1937).

[2] *See, e.g.*, Mississippi Research & Development Center, Housing Needs in Mississippi (April, 1978) (financed in part by a Comprehensive Planning Grant from HUD).

[3] *See* Googan, *Who Will Build the Houses? Mississippi's Answer*, 11 APPALACHIA 10 (August-September, 1977) (discussion of Mississippi's Appalachian Housing Program which provides project-planning loans, grants and technical assistance to sponsors and developers of low and moderate income new and rehabilitated housing).

[4] For example, five cities in northeast Mississippi recently obtained preliminary approval for $6.78 million in HUD grants to revitalize decaying neighborhoods by upgrading substandard houses, financing family relocations, and making other housing improvements. Daily Journal, April 5, 1979, at 1, col. 1.

[5] "Substandard housing" is defined by the Bureau of the Census as housing lacking one or more plumbing facilities and/or overcrowded, *i.e.*, having more than 1.01 occupants per room. *See generally* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 Census of Housing, Vol. VI: Estimates of "Substandard" Housing.

[6] See note 4 *supra*. *See also* MISS. CODE ANN. §§ 43-39-1 to -27 (Supp. 1978) ("Relocation Assistance Law").

[7] Mississippi Research & Development Center, *supra* note 2, at 13 ("Of the total dwelling units needed, 534,262 are expected to be existing sound units, 105,813 are expected to be rehabilitated units, and 214,345 are expected to be newly constructed units.").

[8] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 Census of Housing, Vol. 1: Housing Characteristics for States, Cities & Counties, part 26: Mississippi Summary, at 5 (August 1972).

[9] *Id.* Fewer than fifteen percent of all houses occupied by owners, in contrast to the quality of rental housing, are classified as substandard. *Id.* Thus, the relative positions of

to insure that housing is not only available but also habitable, existing houses will continue to deteriorate and the houses now being built will soon embark upon the path to decay. Even more importantly, tenants will remain a disadvantaged though numerically substantial segment of our population.

The courts or legislatures in over thirty states[10] have attempted to correct similar problems by imposing either judicially or by statute a warranty in leases that the leased premises are fit for human habitation. This Comment will trace the history of landlord-tenant law and the development of the implied warranty of habitability, and will consider some unresolved issues. Finally, discussion will center on the Mississippi law concerning leases and the need for imposition of the warranty of habitability in this state.

I. Common Law Antecedents

A. Traditional Concepts of Leases

Under the common law, a lease is considered to be primarily a conveyance by which an estate in land is created by the landlord in his tenant; thus, the landlord-tenant relationship has traditionally been governed by principles of property law.[11] Since the early common law, the doctrine of caveat emptor, or "buyer beware," relating to the sale of realty, has frequently been applied to leases, resulting in a rule of "caveat lessee."[12] According to this doctrine, one who purchases property must ensure, by inspecting the land prior to purchase, that the property is not defective. Similarly, before executing a lease, a lessee is expected to inspect the property to be leased to discover any defects.[13] Based on the doctrine of caveat lessee, the landlord's sole obligations are

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owners and tenants have changed little since the early part of the century. *See* Mississippi State Planning Comm'n, *supra* note 1, at 23 ("conveniences enjoyed by the owners are superior to those enjoyed by the tenants").

[10] See notes 48 & 49 and accompanying text *infra*.

[11] 2 W. Walsh, Commentaries on the Law of Real Property § 139, at 107-08 (1947). *See also* 2 R. Powell, The Law of Real Property ¶ 221[1], at 176 (1971).

[12] 1 American Law of Property § 3.45, at 267 (A. Casner ed. 1952); *see, e.g.*, Robbins v. Jones, 15 C.B.N.S. 221, 240, 143 Eng. Rep. 768, 776 (1863) ("there is no law against letting a tumble-down house"). The rule has been expressed by American courts that a tenant "takes the premises as he finds them." *See, e.g.*, Strecker v. Barnard, 109 Cal. App. 2d 149, 240 P.2d 345, 347 (1st Dist. 1952); Speckman v. Schuster, 183 Ky. 326, 209 S.W. 372, 374 (1919); Rich v. Swalm, 161 Miss. 505, 576, 137 So. 325, 326 (1930); Coleman v. Steinberg, 54 N.J. 58, 253 A.2d 167, 170 (1969). Since application of the doctrine is premised upon the prospective tenant's opportunity to inspect the premises before executing the lease, it has been held inapplicable where the opportunity is either lacking or futile. See cases cited in notes 24 & 25 *infra*.

[13] 3 G. Thompson, Commentaries on the Law of Real Property § 1129 (1959).

to deliver possession of the premises[14] and to refrain from disturbing the tenant's "quiet enjoyment" of the property.[15] The landlord has no duty to repair and maintain the premises,[16] nor is there any implied warranty that the leased land or premises is habitable.[17]

The concept of caveat lessee, which developed in the English common law, was accepted by American courts, and with it immigrated the companion rules that there is no implied warranty of habitability and no duty to repair on the part of the landlord.[18] These rules are harsh enough in themselves, but the position of the tenant at common law is made even more harsh by the theory of independent covenants. Under this theory, covenants in a lease are considered to be independent;[19] thus, even if a tenant is able to obtain an express warranty from his landlord, or one of the limited exceptions to the no-warranty rule is applicable,[20] a breach of warranty by the landlord does not affect the tenant's obligation to pay rent. If a tenant withholds rent and the landlord brings an action for possession of the property, the landlord's breach is not a defense to the action.[21]

Application of these principles of property law to leases originated in an agrarian-based society. Prior to the Industrial Revolution, leases typically involved a transfer to a tenant of land to be used for agricultural purposes. Frequently there were no structures on the land, and if there were, they were of minor importance in the lease.[22] With the Industrial Revolution and concentration of population in urban areas, structural improvements became more important to tenants. Indeed, leases began to resemble contracts, often containing express covenants and warranties.[23] The application of property law principles suitable to a lease of land for agricultural purposes is particularly inappropriate in modern society where a tenant enters a lease primarily to secure a liva-

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[14] *See* West v. Kitchell, 109 Miss. 328, 334, 68 So. 469, 470 (1915) (American rule—landlord is required to deliver "legal" possession); King v. Reynolds, 67 Ala. 229, 231 (1880) (English rule—landlord is required to deliver actual, physical possession).

[15] *See* 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 251-53 (1926).

[16] That the landlord is under no duty to make repairs is a well-established common law rule. *E.g.*, E.E. Terry, Inc. v. Cities of Helena and West Helena, 256 Ark. 226, 506 S.W.2d 573, 578 (1974); Ogden v. McChesney, 584 P.2d 636, 637 (Colo. 1978); Horst v. Newman, 291 S.W.2d 567, 568 (Ky. 1956); Causey v. Norwood, 170 Miss. 874, 879, 156 So. 592, 593 (1934).

[17] Hart v. Windsor, 12 M & W 68, 87-88, 152 Eng. Rep. 1114, 1122 (1843).

[18] See notes 13 through 16 and accompanying text *supra*.

[19] *E.g.*, Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208, 217 (1972).

[20] See notes 24 through 27 and accompanying text *infra*.

[21] 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952).

[22] Lesar, *The Landlord-Tenant Relationship in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369, 377 (1961).

[23] R. POWELL, *supra* note 11, ¶ 221[1], at 180-81.

ble dwelling. Despite these changed circumstances, property law rather than contract law has continued to govern the landlord-tenant relationship in England and, until recent years, in America.

B. Attempts to Circumvent Common Law Rules

Recognizing the injustices caused by the no-warranty rule and the independent covenants doctrine, courts have for years chipped away at the common law rules. For example, the rule that a lease contains no implied warranty of habitability has been held inapplicable to short-term leases of furnished dwellings,[24] to leases executed prior to completion of the structure,[25] and to leases of premises containing dangerous latent defects known to the landlord but not disclosed by him to the tenant.[26] Perhaps the most ingenious method of circumventing the common law as applied to the landlord-tenant relationship is the doctrine of constructive eviction. To reduce hardships imposed by the theory of independent covenants, courts using this device resorted to the legal fiction that a serious interference with the tenant's possession or use of the premises by the landlord amounted to a "constructive eviction," and

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[24] *See* Smith v. Marrable, 11 M & W 5, 8-9, 152 Eng. Rep. 693, 694 (1848); *accord,* Young v. Povich, 121 Me. 141, 116 A. 26, 28 (1922); Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E.2d 418, 420 (1946); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286, 287 (1892). *But cf.* Boothman v. Lux, 349 Mass. 426, 208 N.E.2d 819, 821 (1965) (lease of furnished room on second floor contained no implied warranty that stairway was habitable); Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793, 795 (1947) (exception to no-implied-warranty rule does not apply to defects arising after execution of the lease); Bolieau v. Traiser, 253 Mass. 346, 148 N.E. 809, 810 (1925) (exception does not apply to partially furnished dwellings).

[25] *See* J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App. 1930), *rev'd on other grounds,* 66 S.W.2d 676 (Tex. 1933). *But see* Oliver v. Hartzell, 170 Ark. 512, 280 S.W. 979, 980-81 (1926) (structure must be "so far lacking in completeness that the lessee has no opportunity to determine its fitness").

[26] *See* Gamble-Robinson Co. v. Buzzard, 65 F.2d 950, 954 (8th Cir. 1933); Chambers v. Buettner, 321 So. 2d 650, 653 (Ala. 1975); Civale v. Meriden Hous. Auth., 150 Conn. 594, 192 A.2d 548, 549 (1963); Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 645, 78 So. 2d 743, 749 (1955).

Additionally, an exception to the rule that a landlord has no duty to repair has developed where the landlord retains "control" of the premises. *See, e.g.,* Hiller v. Wiley, 6 So. 2d 317, 317 (Miss. 1942) (since "common approach" within landlord's control, the landlord was responsible for its upkeep); *cf.* Jones v. Houston Aristocrat Apartments, Ltd., 572 S.W.2d 1, 2 (Tex. Civ. App. 1978) (lease provision forbidding tenant to make repairs without landlord's consent gave "constructive possession" of premises to landlord and thus imposed duty of reasonable care). Moreover, at least one court has held that making some repairs may have created an implied duty to repair. *See* Jones v. Chicago Hous. Auth., 59 Ill. App. 3d 138, 376 N.E.2d 26, 28 (1978) ("course of conduct" reasoning). *But see* McKenzie v. Atlantic Manor, Inc., 181 So. 2d 554, 555 (Fla. App. 1965) (no implied duty to repair arises from landlord's making some repairs).

the tenant could assert the breach as a defense to the landlord's suit for possession or nonpayment of rent.[27] To show that he had been "evicted," however, the tenant was required to abandon the premises within a reasonable time after the landlord's breach.[28] These remedial efforts established a trend away from the doctrine of caveat lessee and indicated judicial recognition that the theory of independent covenants does not comport with the needs of tenants in modern society. But by circumventing rather than rejecting the common law view of a lease as a conveyance the exceptions served only to confuse and retard[29] the overall development of the law regarding a tenant's right to habitable premises.[30]

In addition to judicial efforts to afford tenants relief, legislatures, since the turn of the century,[31] have enacted housing codes[32] reflecting a policy judgment that the existence of uninhabitable dwellings is inimical to the public welfare, and that the primary responsibility for providing habitable rental dwellings should be borne by the landlords.[33] Although these statutes are commendable as attempts to alleviate the plight of the tenant, the criminal and civil sanctions provided for viola-

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[27] *See, e.g.*, Lemle v. Breeden, 57 Haw. 426, 462 P.2d 470, 473 (1969).

[28] *See, e.g.*, Kiernan v. Germain, 61 Miss. 498, 503 (1884) (remaining in possession for three months after breach precluded assertion of constructive eviction); Thompson v. Shoemaker, 7 N.C. App. 687, 173 S.E.2d 627, 630 (1970) (court rejected tenant's argument that since she was of "limited means" she should be allowed to assert the doctrine of constructive eviction notwithstanding her failure to move, reasoning that "[t]he fact she made timely payments of rent . . . tends to negate any notion that she was financially unable to move elsewhere").

[29] Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1454 (1974).

[30] The "right" to decent shelter is not constitutionally guaranteed but is embodied in public policy. *Compare* Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic need. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . .") *with* 42 U.S.C. § 1441 (1978) ("The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require . . . a decent home and a suitable living environment for every American family . . . .").

[31] Although building codes existed prior to the twentieth century, they were aimed primarily at protecting the public from conflagration and building collapse. Gribetz & Grad, *Housing Code Enforcement: Sanctions & Remedies*, 66 COLUM. L. REV. 1254, 1259 (1966).

[32] Housing codes are "basically maintenance codes which also regulate the environmental factors of residential buildings, and, in the case of rental property, the facilities that must be supplied by the landlord." R. SANDERSON, CODES & CODE ADMINISTRATION 14 (1969).

[33] *See* Gribetz & Grad, *supra* note 31, at 1259-67 (traces history of housing code development and enforcement).

tion of the statutes proved difficult to enforce, often rendering the statutes ineffective.[34]

Because of the inhibitive effects of the common law and the difficulties of housing code enforcement, it was not until the 1960s that the era of actual judicial reform was begun. The earlier legislative and judicial attempts, however, represented a growing concern about the problems of tenants and formed a basis for the drastic changes made by the judiciary in the last decade. Thus, adoption of the implied warranty of habitability in residential leases is not a total departure from precedent, but merely "the next step in the law."[35]

II. The Implied Warranty of Habitability

A. *Development of the Implied Warranty*

It was not until the 1960s that the courts at last recognized and acted on the need for comprehensive reformation rather than piecemeal limitation of the common law rules concerning the warranty of habitability. One of the first courts to attack the common law rule was the Wisconsin Supreme Court. In a 1961 case, *Pines v. Perssion*,[36] the plaintiffs had leased a furnished house from the defendant, who had promised to clean and repair the premises. When the landlord failed to make repairs, the plaintiffs moved out and sued to recover their deposit, as well as reimbursement for work they had done on the house. The court found for the plaintiffs on the ground that the defendant had breached the "implied warranty of habitability" in the lease.[37] Although *Pines* appeared to be a drastic break from precedent, the decision's expansive effect was later restricted in *Posnanski v. Hood.*[38] Without making any reference to *Pines,* the court refused to recognize an implied warranty of habitability, stating that "the common council has indicated an intent that the housing code be enforced administratively and not by terms implied in a lease."[39]

In a 1969 case, *Reste Realty Corp. v. Cooper,*[40] the New Jersey Supreme Court indicated that it might overrule the common law doctrine of caveat emptor, but avoided the question by finding for the tenant on the basis of constructive eviction.[41] Nonetheless, the court

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[34] *See id. See generally* Castrataro, *Housing Code Enforcements: A Century of Failure in New York City,* 14 N.Y.L.F. 60 (1968).

[35] Pugh v. Holmes, 384 A.2d 1234, 1239 (Pa. Super. 1978).

[36] 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[37] 111 N.W.2d at 412.

[38] 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

[39] 174 N.W.2d at 533.

[40] 53 N.J. 444, 251 A.2d 268 (1969).

[41] 251 A.2d at 275.

noted various reasons for implying a warranty of habitability in leases, stating that "present day demands of fair treatment for tenants" require a change in the common law rules.[42]

Finally, the Supreme Court of Hawaii, in *Lemle v. Breeden*,[43] took the long overdue step and held explicitly that a lease is a contractual relationship that contains an implied warranty of habitability and fitness for the purposes intended.[44] In rejecting the common law rule, the court stated: "[I]n an urban society where the vast majority of tenants do not reap the rent directly from the land but bargain primarily for the right to enjoy the premises for living purposes . . . common law conceptions of a lease and the tenant's liability for rent are no longer viable."[45]

Shortly after the *Lemle* decision, the Hawaii court's lead was followed by the District of Columbia in *Javins v. First National Realty Corp.*[46] and New Jersey in *Marini v. Ireland.*[47] With the guidance provided by these cases, other courts were quick to act in rejecting the common law rules. Recognition that a residential lease is a contract that contains an implied warranty that the premises are fit for human occupation has become more than a trend: the warranty is now explicity recognized by case law or statute in at least thirty-five states[48] and the

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[42] *Id.* at 273.

[43] 51 Haw. 426, 462 P.2d 270 (1969).

[44] 462 P.2d at 474.

[45] *Id.* at 473.

[46] 428 F.2d 1071, 1080 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

[47] 56 N.J. 130, 265 A.2d 526, 534 (1970).

[48] Alaska: ALASKA STAT. §§ 34.03.100, .160, .180 (1975); Arizona: ARIZ. REV. STAT. § 33-1361 (1974); California: CAL. CIV. CODE §§ 1941, 1941.1, 1942 (West 1954 & Cum. Supp. 1978); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Connecticut: CONN. GEN. STAT. ANN. §§ 47a-7, -12, -13 (West 1978); Delaware: DEL. CODE ANN. tit. 25, § 5303 (1974); Florida: FLA. STAT. ANN. §§ 83.51, .56 (West Supp. 1979); Georgia: GA. CODE ANN. §§ 61-111, -112 (1966); Hawaii: HAW. REV. STAT. § 521-42 (1976); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Idaho: IDAHO CODE § 6-320 (Cum. Supp. 1977); Illinois: Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Indiana: Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976); Iowa: Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kansas: Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Kentucky: KY. REV. STAT. §§ 383.595, .625 (Cum. Supp. 1978); Louisiana: Wilson v. Hearn, 150 So. 2d 911 (La. 1963); Maine: ME. REV. STAT. ANN. tit. 14, § 6021 (West Supp. 1978); Maryland: MD. REAL PROP. CODE ANN. § 8-211 (Cum. Supp. 1978); Massachusetts: MASS. ANN. LAWS ch. 239, § 8A (Michie/Law Co-op 1932 & Cum. Supp. 1979); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Michigan: MICH. STAT. ANN. § 554.139 (Supp. 1979); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Minnesota: MINN. STAT. ANN. § 504.18 (West Supp. 1979); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973); Missouri: King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); Nebraska: NEB. REV. STAT. §§ 76-1419, -1425 to -1429 (1976); New Hampshire: Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); New Jersey: Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); New Mexico: N.M. STAT. ANN. § 70-7-20 (Supp. 1975); New York: N.Y. REAL PROP. LAW § 235-6 (McKinney Supp. 1979); North Carolina:

District of Columbia.[49]

The rationale and policy considerations underlying courts' recognition of the implied warranty of habitability are perhaps best articulated in the *Javins* opinion. The court expressed three overriding considerations that compelled acceptance of the warranty. First, the court noted that the factual assumptions underlying the rule of "caveat emptor" are not valid in modern society. This property concept was conceived at a time when the tenant was primarily concerned with the land itself; today, the value of a lease lies in its provision of a place to live. Additionally, the agrarian tenant probably had the skills necessary to repair and maintain buildings, while the ordinary modern tenant has no similar ability.[50]

Second, the court concluded that the law of landlord and tenant is analogous to the consumer protection cases in which the courts seek to protect the legitimate expectations of the consumer.[51] The California Supreme Court in *Green v. Superior Court*[52] also emphasized this consideration, noting the modern tenant's expectations and reliance on the lessor. According to the *Green* court: "A tenant may reasonably expect that the product he is purchasing is fit for the purposes for which it is obtained, that is, a living unit."[53]

Third, the *Javins* court stated that the current urban housing situation requires rejection of the old rule. Because of the severe shortage of housing, according to the court, tenants have no bargaining power with which they can obtain express warranties from landlords.[54] Additionally, because of the housing shortage, the constructive eviction doctrine becomes virtually useless since tenants are unable to locate other housing once they have vacated substandard premises.[55] Finally, poor housing "is detrimental to the whole society, not merely to the unlucky ones who

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N.C. GEN. STAT. §§ 42-38 to -44 (Supp. 1977); Ohio: OHIO REV. CODE ANN. §§ 5321.04, .07 (Page Supp. 1978); Oregon: OR. REV. STAT. §§ 91.770, .800 to .815 (1977); Pennsylvania: Pugh v. Holmes, 384 A.2d 1234 (Pa. Super. 1978); Tennessee: TENN. CODE ANN. § 64-2824 (1976); Texas: Kamarath v. Bennett, 586 S.W.2d 658 (Tex. 1978); Virginia: VA. CODE §§ 55-248.13, .25, .26 (Cum. Supp. 1978); Washington: WASH. REV. CODE ANN. §§ 59.18.060 to .120 (Supp. 1977); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); Wisconsin: Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[49] Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), *noted in* 42 MISS. L.J. 523 (1971).

[50] Javins v. First Nat'l Realty Corp., 428 F.2d at 1078-79.

[51] *Id.* at 1075.

[52] 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

[53] 517 P.2d at 1174-75.

[54] 428 F.2d at 1079-80. *See also* King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); Kline v. Burns, 276 A.2d 248 (N.H. 1971).

[55] Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1174 n.10, 111 Cal. Rptr. 704 (1974).

must suffer the daily indignity of living in a slum."[56]

The legislative policy as expressed in housing codes has been a further catalyst for discarding the common law rule. The California court discussed this policy in *Green*:

> These comprehensive housing codes affirm that, under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing in our state . . . . To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.[57]

B. Scope of the Implied Warranty

Premised upon the recognition that a tenant is in reality a buyer, and a landlord a seller of housing,[58] the warranty of habitability gives legal effect[59] to a tenant's "reasonable expectations"[60] that leased premises will, at a minimum, be safe, sanitary, and fit for living.[61] The warranty imposes a duty upon the landlord both to make the premises

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[56] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079-80 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

[57] 517 P.2d at 1175.

[58] In Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), the court stated:

> [T]he modern urban tenant is in the same position as any other normal consumer of goods . . . . [A] tenant seeks to purchase "housing" from his landlord for a specified period of time. The landlord "sells" housing, enjoying a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building. A tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit . . . .

517 P.2d at 1175; *see* Mease v. Fox, 200 N.W.2d 791, 793-94 (Iowa 1972) ("The modern city tenant has little interest in the land. He seeks a combination of living space, utilities, facilities, and services suitable for occupation."); King v. Moorehead, 495 S.W.2d 65, 74 (Mo. App. 1973) ("landlord does not agree to lease merely space, but habitable space").

[59] Prior to judicial development of the implied warranty, habitability requirements in housing codes were considered enforceable only by administrative action and thus had little remedial effect on the problems of individual tenants. *See* Saunders v. First Nat'l Realty Corp., 245 A.2d 836, 838 (D.C. Ct. App. 1968) (rejected tenant's argument that landlord was under a "contractual duty" to maintain the premises in compliance with housing regulations), *rev'd sub nom.* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Riley v. Nelson, 256 S.C. 545, 183 S.E.2d 328, 329-30 (1971) (housing code violations constituted no defense for tenants in eviction proceedings).

[60] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

[61] Kamarath v. Bennett, 568 S.W.2d 658, 661 (Tex. 1978).

habitable at the beginning[62] of the lease and to maintain the premises in a habitable condition during the term of the lease.[63]

The warranty of habitability would be of little or no value to a tenant if the courts continued to adhere to the doctrine of independent covenants; accordingly, courts implying a warranty of habitability into leases have also overruled the common law doctrine that a tenant's duty to pay rent exists independently of any breach by the landlord. Instead, the lease is considered an ordinary bilateral contract[64] containing mutually dependent obligations.[65] If the landlord breaches the implied warranty the tenant is absolved of the duty to pay rent.[66] The tenant may assert the breach either defensively[67] or in an original

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[62] Some courts have limited this aspect of the implied warranty to latent defects. See notes 114 through 125 and accompanying text *infra.*

[63] *See, e.g.,* Mease v. Fox, 200 N.W.2d 791,796 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 251-52 (1971); Pugh v. Holmes, 384 A.2d 1234, 1240 (Pa. Super. 1978).

[64] *E.g.,* Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470, 474 (1969); King v. Moorehead, 495 S.W.2d 65, 70 (Mo. App. 1973).

[65] *E.g.,* Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 764 (Ind. Ct. App. 1976); Steele v. Lattimer, 214 Kan. 329, 521 P.2d 304, 308 (1974); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850, 853 (1972); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17, 21 (1973); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409, 413 (1961); *cf.* Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339, 341 (1973) (held only statutorily imposed covenants are mutually dependent with tenant's obligation to pay rent). *Contra,* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.W.2d 208, 217 (1972).

[66] Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 842 (1973). Thus, a tenant no longer has to resort to a constructive eviction defense, which requires him to vacate the premises, see notes 19 through 21 and accompanying text *supra,* in order to justify his refusal to pay rent. *See* Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470, 475 (1969) ("The doctrine of constructive eviction . . . no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available.").

Some courts have adopted procedures whereby the tenant can be required to make rental payments into court, as they become due, for as long as he remains in possession. *See, e.g.,* Bell v. Tsintolas Realty Corp., 430 F.2d 474, 481-84 (D.C. Cir. 1970) (authorized protective orders in "limited circumstances"); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704 (1974) (adopted protective order as device "to protect the landlord's economic interests without depriving the tenant of a meaningful opportunity to raise the breach of warranty"); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850, 854 (1972) (noted that landlord can demand bond during pendency of suit); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339, 343 (1973) (suggested that tenant either pay rent into court and then court could order payment out of the fund to the landlord to make repairs, or place rent in escrow, or require adequate security). A protective order can help minimize the possibility of tenants' making frivolous claims based upon the warranty and can protect the landlord from loss of rent if the tenant prevails. Moskovitz, *supra* note 29, at 1473-75. But since the order itself is subject to abuse and since it reduces a measure of control held by the tenant—financial pressure—it is generally agreed that it should not be granted absent a specific showing of need by the landlord, and even then, its use should be narrowly circumscribed. *Id.* at 1476-81.

[67] *See, e.g.,* Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850, 851 (1972) (affirma-

action[68] ex contractu.[69] By adopting the view that a lease is primarily a contract rather than a conveyance, courts have made available to tenants the basic contract remedies[70] of damages,[71] recission,[72] and

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tive defense to dispossess action); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339, 340, 342 (1973) (affirmative defense in unlawful detainer action); Park West Management Corp. v. Mitchell, 404 N.Y.S.2d 115, 116 (App. Div. 1978) (counterclaim in suit for rent); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160, 164 (1973) (affirmative defense to unlawful detainer action).

[68] *See, e.g.*, Steele v. Latimer, 214 Kan. 329, 521 P.2d 304, 306 (1974) (suit to recover rent paid and to enjoin future violations of housing code); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17, 19 (1973) (suit to recover difference between actual value of lease and rent paid); Fair v. Negley, 390 A.2d 240, 242 (Pa. Super. 1978) (suit to recover rental payments and excessive water bills).

[69] The courts are divided on the issue of whether the warranty applies to personal injury cases. *Compare* Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 761-62 (Ind. Ct. App. 1976) (recovery for wrongful death premised on landlord's breach of implied warranty); *cf.* Fair v. Negley, 390 A.2d 240, 246 (Pa. Super. 1978) (held tenants had right to allege and prove that by breaching the implied warranty landlord had intentionally inflicted emotional distress upon the tenants) *with* Dapkunas v. Cagle, 42 Ill. App. 3d 644, 356 N.E.2d 575, 579-81 (1976) (affirming judgment in favor of landlord in tenant's personal injury action, court noted that it was unnecessary to parallel development of products liability law since landlord is not "totally insulated" from liability) *and* Morris v. Kaylor Eng'ing Co., 565 S.W.2d 334, 334 (Tex. Civ. App. 1978) ("The warranty of habitability does not apply to the landlord-tenant relationship in a personal injury case . . . .").

[70] Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470, 475 (1969). Some courts have recognized an additional remedy, that of "repair and deduct." *See, e.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526, 535 (1970).

[71] If the tenant remains in possession, he is liable for reasonable rent even though he proves a breach of the warranty. Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 844 (1973) ("reasonable value, if any, of his use of the premises"). Two methods have evolved for determining damages (or amount of rent deduction) caused by the breach; difference in value, *see, e.g.*, Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 845 (1973) ("the difference between the value of the dwelling as warranted . . . and the value of the dwelling as it exists in its defective condition"); *cf.* Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 252 (1971) ("difference between the agreed rent and the fair rental value of the premises"), and percentage reduction of use, *see, e.g.*, Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556, 562 (Dist. Ct. 1970) (25% reduction of use caused by defect; corresponding reduction in rent price); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406, 412 (City Civ. Ct. 1973) (rodent infestation and inadequate heat and water supply reduced value of apartment at least by one-half of agreed rent).

If the tenant has vacated the premises, the measure of damages is the value of the lease for the unexpired term. Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972). Moreover, the tenant may be allowed to recover incidental and consequential damages. *Id.*; *cf.* Moskovitz, *supra* note 29, at 1470-73 (suggesting that damages for "discomfort and annoyance" rather than damages based upon the economic value of the premises would "reflect more realistically the actual damage suffered by the tenant").

[72] To rescind a lease, the tenant must both give the landlord notice and vacate the premises. *See* Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470, 475 (1969)(holding by implica-

reformation.[73] Additionally, some courts have indicated that remedies such as specific performance[74] and declaratory relief[75] may be available.[76]

Most courts[77] have held that a tenant seeking redress for breach of the warranty must, to prevail, have given the landlord oral or written notice of the defect and must have allowed the landlord a reasonable time to correct the defect.[78] Notice is unnecessary, however, if the landlord has actual knowledge[79] of the defect, and if one tenant has given notice, other tenants are not required to give notice of the same defect.[80]

Several courts have indicated that a tenant may not obtain relief if the alleged defects resulted from abnormal conduct or misuse by the tenant.[81] The Missouri court in *King v. Moorehead*[82] explained the ra-

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tion); *cf.* Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 843-44 (1973) (tenant is liable for "reasonable value" of use of premises before vacating).

[73] *See, e.g.*, Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556, 562 (Dist. Ct. 1970) (court ordered 25% abatement of rent for landlord's failure to provide hot water). The tenant is allowed to remain in possession where the lease is reformed. *See id.*

[74] *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.61 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); South Austin Realty Ass'n v. Sombright, 47 Ill. App. 3d 89, 361 N.E.2d 795, 796, 799 (1977).

[75] *E.g.*, Hinson v. Delis, 26 Cal. App. 3d, 102 Cal. Rptr. 661 (1972), *discussed in* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1176, 111 Cal. Rptr. 704 (1974).

[76] If a tenant wishes to remain in possession but can be subjected to retaliatory eviction or other retaliatory measures, such as an unjustified rent increase, for seeking redress under the warranty, the scope and effectiveness of the tenant's remedies would be substantially undermined. *See* Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Reform in the District of Columbia*, 59 GEO. L. J. 909, 943 (1971). Thus, several courts have recognized the defense of retaliatory eviction, *see, e.g.*, Bowles v. Blue Lake Dev. Corp., 504 F.2d 1094, 1097 (5th Cir. 1974) (construing Florida law); Robinson v. Diamond Hous. Corp., 463 F.2d 853, 857 (D.C. Cir. 1972); McCall v. Fickes, 556 P.2d 535, 539-40 (Alaska 1976), and it has been codified in several statutes. *See, e.g.*, UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101; ARIZ. REV. STAT. § 33-1381 (1974); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); TENN. CODE ANN. § 53-5505 (1977).

[77] *E.g.*, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 844 (1973); King v. Moorehead, 495 S.W.2d 65, 76 (Mo. App. 1973); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17, 22 (1973). *But cf.* Jarrell v. Hartman, 48 Ill. App. 3d 985, 363 N.E.2d 626, 628 (1977) (under statutory warranty, no duty to give notice since "[i]t would be strange indeed to require a tenant to give a landlord notice of what the law is with reference to the landlord's duty or duties").

[78] A tenant who makes reasonable attempts to give notice but is unable to do so has met the notice requirement. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526, 535 (1970).

[79] King v. Moorehead, 495 S.W.2d 65, 76 (Mo. App. 1973); *cf.* McKenna v. Begin, ___ Mass. App. Ct. ___, 362 N.E.2d 548, 550 (1977) (landlord is presumed to know of defects arising before tenancy begins).

[80] Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 844 (1973).

[81] *E.g.*, *id.*, 293 N.E.2d at 844; Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 252 (1971); Kamarath v. Bennett, 568 S.W.2d 658, 661 (Tex. 1978).

[82] 495 S.W.2d 65 (Mo. App. 1973).

tionale supporting this rule: "The contract principle that a person may not benefit from his own wrong will exonerate a landlord for a defect or deficiency caused by a tenant's wrongful conduct."[83] The Court of Appeals for the District of Columbia Circuit, after making the same statement in *Javins v. First National Realty Corp.*,[84] qualified the rule by noting that "defects resulting from inadequate repairs or materials that disintegrate under normal use would not be assignable to the tenant."[85]

C. *Standards of Habitability*

The standards for determining habitability depend in part upon the approach used by the court to adopt the warranty. If a court bases its adoption solely on the legislative policy as expressed in a housing code,[86] the standards of habitability imposed are those specified in the applicable code.[87] If, however, the adoption is based upon judicial rejection of the common law and the explicit application of contract law to leases,[88] the warranty is held to arise "by operation of law"[89] and the standards are judicially determined.[90]

Although the statutory method of determining standards of habita-

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[83] *Id.* at 76.

[84] 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

[85] 428 F.2d at 1082 n.62.

[86] *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208, 217 (1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304, 309-10 (1974); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850, 852-53 (1972); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339, 341-42 (1973); King v. Moorehead, 495 S.W.2d 65, 75 (Mo. App. 1973); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919, 924 (Mun. Ct. of Sylvania 1972).

[87] The warranty of the landlord is that he will provide facilities and services vital to the life, health and safety of the tenant and to the use of the premises for residential purposes. *It is an obligation which the landlord fulfills by substantial compliance with the relevant provisions of an applicable housing code.*

King v. Moorehead, 495 S.W.2d 65, 75 (Mo. App. 1973)(emphasis added) (citations omitted). See cases cited in note 86 *supra.*

[88] *See, e.g.,* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1176, 111 Cal. Rptr. 704 (1974); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470, 474 (1969); Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 746 (Ind. Ct. App. 1976); Mease v. Fox, 200 N.W.2d 791, 794 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 252 (1971); Pugh v. Holmes, 384 A.2d 1234, 1236, 1240 (Pa. Super. 1978); Kamarath v. Bennett, 568 S.W.2d 658, 660-61 (Tex. 1978); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160, 164 (1973).

[89] *E.g.,* Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 252 (1971).

[90] *See* Comment, *The Landlord-Tenant Relationship Breaks into the Twentieth Century: The Implied Warranty of Habitability,* 30 BAYLOR L. REV. 513, 516 (1978) ("[T]he implied warranty of habitability does not create an absolute standard of habitability but rather seeks to establish a method of redress when the premises fail to meet a tenant's reasonable expectation of habitability based upon the surrounding physical and economic factors.").

bility may provide more concrete guidelines, there are obvious disadvantages in this approach. A tenant who complains of an alleged defect that is not covered by the housing code is without remedy under the implied warranty. Housing codes may provide courts with an effective guide for determining habitability, but they should not be used as the sole criterion for ascertaining whether a defect is actionable.[91]

The judicially created standards of habitability lack the definiteness of a standard based on a housing code; there is, however, in the judicial standard a desirable flexibility that is lacking where the standard is based on legislative rules. The judicial standard leaves the court free to determine each case on its facts, taking into consideration a number of factors.[92] Furthermore, most courts following the judicial approach consider housing code requirements as a threshold element[93] in determining whether the warranty of habitability has been breached. Since most statutes impose standards comparable[94] to those defined by the courts, there is, apart from the flexibility of the judicial approach, little substantive difference in the two methods.

Use of the housing code requirements as a factor to be considered in application of a judicial standard has several advantages over either a purely statutory or judicial standard. Combining the two methods avoids the rigidity that occurs when the housing code provides the sole set of criteria. In addition, courts using this method are provided some guidance in determining minimum standards of habitability and are not left to grapple with completely subjective standards such as "bare living requirements."[95]

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[91] Since only "substantial compliance" with the housing code is required, see note 87 *supra*, the court must still determine whether a particular violation of the code is serious enough to constitute a breach of the statutory warranty. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (D.C. Cir.) ("minor violations that do not affect habitability do not constitute a breach"), *cert. denied*, 400 U.S. 925 (1970); King v. Moorehead, 495 S.W.2d 65, 76 (Mo. App. 1973) ("Minor code violations which do not affect habitability will be considered de minimis."); *cf.* Gillette v. Anderson, 4 Ill. App. 3d 838, 282 N.E.2d 149, 152 (1972) (rejected application of negligence per se rule to violation of housing code).

[92] See note 97 and accompanying text *infra*.

[93] The cases differ, however, on how much weight is accorded the housing code requirements. *Compare* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704 (1974) (substantial compliance with code is usually sufficient) *and* Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 844 n.16 (1973) (code standards constitute "threshold requirement" of habitability) *and* Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406, 410 (City Civ. Ct. 1973) (at a minimum, warranty requires substantial compliance with code requirements) *with* Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972) (housing code requirements constitute merely one of several factors to be considered) *and* Pugh v. Holmes, 384 A.2d 1234, 1240 (Pa. Super. 1978) (same) *and* Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978) (same).

[94] See notes 144 through 155 and accompanying text *infra*.

[95] Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556, 559 (Dist. Ct. 1970).

D. Application of the Standard

As evidenced by the preceding discussion, the exact standard of habitability may differ depending on the approach taken by the court in imposing the warranty. Nonetheless, the primary concern of all courts is that the tenant be afforded the essential requirements for a livable home—the "well-known package of goods and services"[96] that an individual seeks in entering a lease.

Factors considered by the courts in determining whether a particular defect constitutes a breach of the warranty include the nature of the defect, its effect on habitability, the length of time the defect persisted, the age of the premises, the amount of rent, the area in which the premises is located, and whether the defect violates a housing law, regulation or ordinance.[97] Materiality of the breach is a question of fact[98] that depends primarily upon whether the defect deprived the tenant of a facility considered "essential"[99] to the residential use of the premises. A breach of the warranty has been found where heat,[100] air-conditioning,[101] plumbing,[102] water supply,[103] electrical wiring[104] and toilet facilities[105] were inadequate or defective. Various structural

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[96] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

[97] See cases cited in note 88 *supra.*

[98] *E.g.,* Lund v. MacArthur, 51 Haw. 473, 462 P.2d 482, 483-84 (1969); Pugh v. Holmes, 384 A.2d 1234, 1240 (Pa. Super. 1978).

[99] *E.g.,* Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978).

[100] *See, e.g.,* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556, 559 (Dist. Ct. 1970). *See also* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704 (1974) (court implied that a breach existed but remanded for factual determination); Longenecker v. Hardin, 130 Ill. App. 2d 468, 264 N.E.2d 878, 879, 882 (1970) (same); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 843 (1973) (same).

[101] *See* Park Hill Terrace Assoc's v. Glennon, 146 N.J. Super. 271, 369 A.2d 938, 941-42 (App. Div. 1977) (evidence sufficient to support finding that lack of air-conditioning rendered premises uninhabitable by "reasonable person" standard).

[102] *See, e.g.,* Fair v. Negley, 390 A.2d 240, 242-43 (Pa. Super. 1978) (defective water system); Kamarath v. Bennett, 568 S.W.2d 658, 659-61 (Tex. 1978) (plumbing, wiring and structural defects in violation of housing code).

[103] *See* Longenecker v. Hardin, 130 Ill. App. 2d 468, 264 N.E.2d 878, 879, 882 (1970) (remanded for consideration).

[104] *See* Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 749, 761-62 (Ind. Ct. App. 1976) (breach of warranty as basis for wrongful death and personal injuries resulting from fire). *See also* Kamarath v. Bennett, 568 S.W.2d 658, 659 (Tex. 1978) (tenant alleged defective wiring; remanded for factual determination).

[105] Marini v. Ireland, 56 N.J. 130, 265 A.2d 536, 538 (1970); *cf.* Gillette v. Anderson, 4 Ill. App. 3d 838, 282 N.E.2d 149, 151 (1972) (lack of bathtub or shower constituted breach of implied warranty based on statutory standards). *But cf.* Morris v. Jones, 128 Ga. App. 847, 198 S.E.2d 354, 355 (1973) (mere fact that house had no bathroom and no hot water

defects,[106] lack of adequate services[107] and unsanitary conditions[108] may also constitute a breach. Conversely, conditions considered nonessential, such as lack of mail facilities,[109] cracked plaster, water leaks and lack of painting[110] have been held outside the scope of the warranty.[111]

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did not render it uninhabitable; remanded for consideration of housing code).

[106] *See, e.g.*, Kamarath v. Bennett, 568 S.W.2d 658, 659 (Tex. 1978) (structural defects caused bricks to fall); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 835 (1973) (leaking ceilings, broken doors and windows); *cf.* Higgins Inv's., Inc. v. Sturgill, 509 S.W.2d 266, 268 (Ky. 1974) (upheld judgment in wrongful death action against landlord based upon failure to provide adequate fire escape in violation of city ordinance).

[107] *See* Park West Management Corp. v. Mitchell, 404 N.Y.S.2d 115, 117 (App. Div. 1978) (extensive interruption in garbage, janitorial and repair services constituted breach of statutory warranty). *See generally* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.) ("package of goods and services" included in warranty), *cert. denied,* 400 U.S. 925 (1970).

[108] *See, e.g.*, Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470, 471 (1969) (rat infestation); Kekllas v. Saddy, 88 Misc. 2d 1042, 389 N.Y.S.2d 756, 758, 760 (Dist. Ct. 1976) (odor of cat urine: nominal damages); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406, 409 (City Civ. Ct. 1973) (severe roach and insect infestation).

[109] Johnson v. Highland Hills Drive Apartments, 568 S.W.2d 661, 662 (Tex. 1978) (per curiam) (dictum). See Comment, *supra* note 90, at 515 for a discussion of the rationale of *Johnson.*

[110] *See* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556, 559 (Dist. Ct. 1970) ("lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does [*sic*] not come within the category of uninhabitability").

[111] Although habitability has usually been construed to refer to the physical premises occupied by the tenant, see cases cited in notes 100 through 108 *supra*, at least one court has extended the warranty beyond the physical structure, *see* Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21, 24 (Law Div. 1975) (breach of warranty where area surrounding townhouse was poorly maintained and usually overflowed by mud and water), and there is some authority for extending the warranty to include such services as protection against criminal activity, *see* Kline v. 1500 Mass. Avenue, 439 F.2d 477, 485 (D.C. Cir. 1970) ("[T]here is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity."); Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74, 77 (1975) (failure to change locks resulting in assault on tenant by man possessing master key stated cause of action based on negligence against landlord); Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d 76, 86 (1975) (held landlord liable for tenant's losses by theft where landlord failed to supply adequate locks), and abatement of disturbances by other tenants, *see* Millbridge Apartments v. Linden, 151 N.J. Super. 168, 376 A.2d 611, 612 (Dist. Ct. 1977) (dictum) ("[U]nder certain circumstances and conditions, repeated loud noise suffered by a residential tenant, which could have been cured by a landlord, can be defense to a dispossess action under the rubric of the warranty of habitability."); *cf.* Park West Management Corp. v. Mitchell, 62 App. Div. 2d 291, 404 N.Y.S.2d 115, 117-18 (1978) (breach of statutory warranty where extensive interruption in garbage, janitorial and repair services caused by building service employees' strike notwithstanding fact that conditions resulted from events beyond landlord's control).

As the Pennsylvania Superior Court noted in *Pugh v. Holmes*:[112] "[W]hile the tenant is entitled to safe and healthy premises, he or she is not entitled to a perfect or aesthetically pleasing dwelling place."[113]

E. Unresolved Issues

Despite the widespread acceptance of the implied warranty of habitability, some important issues remain unresolved. One troublesome area is the holding of some courts[114] that the warranty applies only to "latent" defects[115] existing at the inception of the lease. The logic of impliedly excluding from the scope of the warranty "patent" defects[116] existing at the outset is difficult to fathom. Literally construed, a landlord is not required to correct patent defects before letting the premises, but, once the premises are let, he is required to maintain the premises in a habitable condition. Assuming that the patent defects affect habitability, the landlord would then be required to correct them. Since the courts offer no justification[117] for limiting the warranty to latent defects, it appears that either the language is an inadvertent reappearance of the common law principles,[118] the courts intend that no latent defects can exist at the inception of the tenancy and the only patent defects allowable are those which do not affect habitability,[119] or the courts are implic-

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[112] 384 A.2d 1234 (Pa. Super. 1978).

[113] *Id.* at 1240; *accord,* Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21, 25 (Law. Div. 1975) (landlord is not required to provide "social amenities").

[114] *See, e.g.,* Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972) ("landlord impliedly warrants . . . that there are no latent defects"); Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 251-52 (1971) (warranty means "that there are no latent defects"); Pugh v. Holmes, 384 A.2d 1234, 1240 (Pa. Super. 1978) (same); Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978) (same).

[115] "A latent defect is one which could not have been discovered by inspection." Washburn Storage Co. v. General Motors Corp., 90 Ga. App. 380, 83 S.E.2d 26, 29 (1954).

[116] "A patent defect is a defect which could be discovered by inspection." 83 S.E.2d at 29.

[117] *Cf.* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1070-71 n.3, 111 Cal. Rptr. 704 (1974) (noting without justification that warranty should perhaps be inapplicable where premises are uninhabitable at the inception of the tenancy), *discussed in* Moskovitz, *supra* note 29, at 1449-54 (noting apparent concern of the court that a tenant might abuse the warranty by deliberately renting substandard housing in order to withhold rental payments).

[118] A well-established common law exception to the doctrine of caveat lessee is that a landlord is liable for injuries to a tenant resulting from a "dangerous latent defect," existing at the beginning of the lease and known to the landlord but not disclosed to the tenant. See cases cited in note 26 *supra.*

[119] This interpretation eliminates the apparent illogic and reconciles these cases with those that expressly or impliedly include patent defects, since the only defects prohibited by the warranty are those that affect habitability.

itly authorizing an implied waiver of the warranty.[120] The latter interpretation seems untenable, however, since some of the courts that have limited the warranty to latent defects have prohibited express waiver[121] of the warranty. Moreover, since several courts have held expressly[122] or impliedly[123] that patent defects are included in the warranty it is reasonable to assume that the language is inadvertent. As the Washington Supreme Court noted in *Foisy v. Wyman*:[124] "A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises."[125]

Related to the "latent-patent" confusion is the issue of express waiver. Although some courts have stated that the implied warranty may be waived by express agreement,[126] other courts have held that permitting a waiver of the landlord's duty would be contrary to public policy and would in effect reduce the warranty to a nullity.[127] An inter-

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[120] *Cf.* RESTATEMENT (SECOND) OF PROPERTY—LANDLORD AND TENANT § 5.1, Comment c (1976) (sets forth the view that if a tenant has knowledge of defects, he impliedly waives the right to sue based upon the defects).

[121] For example, in Pugh v. Holmes, 384 A.2d 1234 (Pa. Super. 1978), the court stated that "[t]here must be no latent defects in the facilities or utilities at the beginning of the lease." *Id.* at 1240. But in Fair v. Negley, 390 A.2d 240 (Pa. Super. 1978), the court held ineffective an express waiver of the warranty without discussing the patent-latent distinction. *Id.* at 243.

[122] *E.g.*, Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 843 (1973); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160, 164 (1973).

[123] *See* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704 (1974) (court failed to make any distinction between latent and patent defects); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969) (same); King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973) (same); *cf.* Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919, 923-24 (Mun. Ct. of Sylvania 1972) (where defects in violation of housing code existed at inception of tenancy, lease was an illegal contract).

[124] 83 Wash. 2d 22, 515 P.2d 160 (1973).

[125] 515 P.2d at 164 (tenant knew of defects and negotiated a reduction in rent because of the defects).

[126] *See, e.g.*, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972) (noted breach might not be material if the tenant "voluntarily, knowingly and intelligently waived the defects"); Kamarath v. Bennett, 568 S.W.2d 658, 660 n.2 (Tex. 1978) (stated that holding "should not be construed to mean that a tenant may not, by express agreement, waive the warranty"); *cf.* Sewell v. Royal, 147 Ga. App. 88, 248 S.E.2d 165, 166-67 (1978) (court stated that "any statutory requirement as to the landlord-tenant relationship . . . is not applicable or controlling in a case where the landlord and tenant have expressly contracted as to this obligation with reference to repairs").

[127] *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081-82 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704 (1974); South Austin Realty Ass'n v. Sombright, 47 Ill. App. 3d 89, 361 N.E.2d 795, 799 (1977); Fair v. Negley, 390 A.2d 240, 243 (Pa. Super. 1978); *cf.* Crowell v. Hous. Auth., 495 S.W.2d 887, 889 (Tex. 1973) (held waiver of landlord's liability to tenant for negligence void as contrary to public policy).

mediate approach is to permit waiver only insofar as it does not shift statutory duties.[128] Courts that allow waiver base their decisions upon a freedom of contract theory. But other courts have reasoned that since one of the bases for adopting the warranty is the inequality of bargaining power between landlord and tenant, the concern for freedom of contract is outweighed by public policy considerations.[129] In *Fair v. Negley*[130] the Pennsylvania Superior Court reversed a lower court's application of section 2-316(3)(a) of the Uniform Commercial Code[131] to a lease wherein the tenant had agreed to take the premises "as is."[132] The court reasoned that even if the UCC were applicable, section 2-302 on unconscionability would be controlling.[133] Additionally, the court enumerated four factors to be considered in determining whether the waiver was in violation of public policy: (1) whether the agreement was counter to statutory and regulatory provisions concerning public health and safety, (2) the relative strength of bargaining powers of the landlord and tenant, (3) whether the provision was part of an "unduly harsh and unreasonable standard 'boilerplate' lease," and (4) whether the agreement imposed unreasonable liability and burdens upon a financially ill-equipped tenant.[134] The court concluded that the waiver was void and ineffective,[135] noting that "[w]ere we to permit waiver of the implied warranty by an express provision in the lease, it would be a rare lease in which the waiver would not appear."[136]

Another area of disagreement is the application of the warranty to leases of single family dwellings.[137] Courts that limit the warranty to

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[128] *See* Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 843 (1973) (warranty of habitability may not be waived "in so far as it is based on the State Sanitary Code and local health regulations").

[129] See cases cited in note 127 *supra.*

[130] 390 A.2d 240 (Pa. Super. 1978).

[131] PA. STAT. ANN. tit. 12A, § 2-316(3)(a) (Purdon 1970).

[132] 390 A.2d at 242 ("premises taken in 'as is' condition, tenant knows roof has a leak").

[133] *Id.* at 243 n.1.

[134] *Id.* at 243-45.

[135] *Id.* at 245.

[136] *Id.*

[137] It is also unsettled whether a similar warranty should be implied in leases of buildings for commercial purposes, but most cases have limited the warranty to residential leases. *See, e.g.,* Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108, 110 (D.C. Ct. App. 1973) ("It is one thing for a court to enforce in urban rental housing an implied warranty of habitability . . . but quite another to intrude into established business practices in the hotel-restaurant commerce, as delineated in a negotiated lease."); Service Oil Co. v. White, 218 Kan. 87, 542 P.2d 652, 659 (1975) (court refused to impose warranty upon business or commercial leases); Van Ness Indus. v. Claremont Painting & Decorating Co., 129 N.J. Super. 507, 324 A.2d 102, 105 (1974) (same); Olson v. Scholes, 17 Wash. App.

multiple dwelling units[138] have justified the exclusion of single family dwellings on the ground that the tenant of a single family dwelling has exclusive possession of the premises and therefore has the necessary access to make repairs.[139] Most courts, however, include all residential leases within the scope of the warranty.[140] Since both types of tenants seek the same product—a habitable dwelling—both face the same problems, are equally unskilled at making substantial repairs, and are in the same financial condition and bargaining position, the majority's inclusion of single-family dwellings seems justifiable.[141] As the dissenting opinion argued in *Dapkunas v. Cagle*:[142]

> To protect the lessee of a multiple unit dwelling with an implied warranty of habitability while not extending the same protection to the lessee of a home reaches an illogical and unjustifiable result. Such reasoning favors lessees in major metropolitan areas . . . while denying lessees in smaller communities in rural areas who lease residential homes the same protection in their leases.[143]

III. Parallel Developments

A. *The Statutory Warranty of Habitability*

In addition to the judicially created warranty of habitability, statutes have been passed in a number of jurisdictions which provide a legislatively created warranty.[144] The Uniform Residential Landlord and Tenant Act (URLTA), approved in 1972 by the National Conference of

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383, 563 P.2d 1275, 1281 (1977) (same). *But see* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268, 274 (1969) (held warranty applicable to commercial leases).

[138] *See, e.g.*, Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208, 217 (1972) (held implied warranty of habitability exists in contracts "governing the tenancies of the [tenants] in the multiple unit dwellings").

[139] *See* Dapkunas v. Cagle, 42 Ill. App. 3d 644, 356 N.E.2d 575, 578 (1976); *cf.* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704 (1974) (as evidence of the antiquity of the common law rule that the landlord is under no duty to make repairs, the court noted that "in a multiple-unit dwelling repair will frequently require access to equipment and areas solely in control of the landlord.").

[140] *E.g.*, Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470, 471 (1969); Mease v. Fox, 200 N.W.2d 791, 792 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304, 306 (1974); King v. Moorehead, 495 S.W.2d 65, 67 (Mo. App. 1973); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409, 410 (1961).

[141] *See* Moskovitz, *supra* note 29, at 1447.

[142] 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976).

[143] 356 N.E.2d at 582 (Moran, J., dissenting). *See also* Note, *An Overview of the Tennessee Residential Landlord and Tenant Act*, 7 Memphis St. U.L. Rev. 109, 128 (1977) (criticism of Tennessee statutory law's exclusion of rural tenants from statutory protection).

[144] See statutes cited in note 48 *supra*.

Commissioners on Uniform State Laws,[145] has been adopted in modified form by at least thirteen states.[146]

Following the warranty of habitability recognized by case law,[147] URLTA provides that a landlord shall comply with housing code requirements materially affecting health and safety, shall make repairs and shall do whatever is necessary to keep the premises habitable and the common areas clean and safe.[148] Upon a landlord's failure to comply with his duties, the tenant may deliver written notice specifying the breach to the landlord and may then terminate the lease in thirty days if the breach was not remedied within fourteen days of the notice.[149] Additionally, the tenant may recover actual damages or obtain injunctive relief when a landlord has violated the statutory warranty.[150] Moreover, if the breach is a failure to supply an "essential service,"[151] the tenant may procure the service and deduct its cost, recover damages, or procure "reasonable substitute housing" and recover its cost.[152]

URLTA also provides a self-help remedy where minor defects are involved. If the cost of repair is less than one hundred dollars or one-half the periodic rent, whichever is greater, the tenant may have the necessary work done and deduct the cost of repair from his rent.[153] Furthermore, when a landlord sues for rent or for possession based on nonpayment of rent, the tenant may counterclaim for damages based upon a violation of the warranty.[154] If the tenant makes such a counterclaim, the court is empowered to order the tenant to pay the rent into court.[155]

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[145] UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, Historical Note, in 7A UNIFORM LAWS ANN. 499 (1978) [hereinafter cited as URLTA].

[146] *See* ALASKA STAT. §§ 34.03.010 to .380 (1974); ARIZ. REV. STAT. §§ 33-1301 to -1381 (1974); FLA. STAT. ANN. §§ 83.40 to .63 (West 1976); HAW. REV. STAT. §§ 521-1 to -77 (1976); KAN. STAT. ANN. §§ 58-2540 to -2573 (Supp. 1978); KY. REV. STAT. §§ 383.505 to .715 (Cum. Supp. 1974); MONT. REV. CODES ANN. §§ 42-401 to -442 (Supp. 1977); NEB. REV. STAT. §§ 76-1401 to -1449 (1976); N.M. STAT. ANN. §§ 70-7-1 to -51 (Supp. 1975); N.C. GEN. STAT. §§ 42-38 to -44 (Supp. 1977); OR. REV. STAT. §§ 91.700 to .865 (1977); TENN. CODE ANN. §§ 64-2801 to -2864 (1976); VA. CODE ANN. §§ 55-248.2 to -248.40 (Cum. Supp. 1977).

[147] URLTA § 2.104, Comment.

[148] *Id.* § 2.104. URLTA also imposes specific duties of reasonable care upon the tenant. *See id.* § 3.101.

[149] *Id.* § 4.101(a).

[150] *Id.* § 4.101(b).

[151] *See id.* § 4.104(a) ("heat, running water, hot water, electric, gas, or other essential service").

[152] *Id.* § 4.104(a) & (b).

[153] *Id.* § 4.103.

[154] *Id.* § 4.105(a) & (b).

[155] *Id.* § 4.105(a) ("all or part of the rent accrued or thereafter accruing"). One commentator has criticized the language of this section as providing an unjustified and possibly unconstitutional "accrued rent precondition" to the tenant's assertion of a counter-

Although largely a codification of the judicially created remedy, URLTA differs from the case law in some aspects. First, it resolves some of the issues that have divided the courts: no distinction is made between latent and patent defects; express waiver of the warranty is prohibited;[156] and the warranty applies to both single-family and multiple-unit dwellings.[157] Second, URLTA recognizes and provides a remedy for a serious potential impediment to implementation of the warranty[158] by expressly prohibiting retaliatory conduct by a landlord.[159]

URLTA effects basically the same reforms as the judicially created warranty—application of contract principles to leases, imposition of a warranty of habitability in leases, and recognition of covenants in leases as mutually dependent. The duties imposed on the landlord, as well as the remedies available to the tenant, are similar.

Though the results reached through use of the statutorily and judicially created warranties are essentially identical, several considerations militate in favor of adoption of the statutory route. A legislative statement that a landlord must comply with a warranty of habitability would be much more effective in prompting compliance than would a judicial edict. The boundaries of a statutory warranty would be more certain than those of a judicially imposed warranty, and cases arising under the statute would be less susceptible to being distinguished or overruled.

B. The Illegal Contract Doctrine

Rather than implying a warranty of habitability, a few courts have, in an effort to protect tenants, resorted to the doctrine of illegal contract. In *Brown v. Southall Realty Co.*[160] a landlord brought a possessory action

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claim. *See* Moskovitz, *supra* note 29, at 1475-76 & n.130.

[156] URLTA § 1.403(a)(1), (4). URLTA does, however, allow a landlord and tenant of any dwelling other than a single family residence to agree "that the tenant will perform specified repairs, maintenance tasks, alterations, or remodeling," but only if

> (1) the agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the landlord and is set forth in a separate writing signed by the parties and supported by adequate considerations;
>
> (2) the work is not necessary to cure noncompliance with [the landlord's duties to maintain the premises]; and
>
> (3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

Id. § 2.104(d).

[157] URLTA does not, however, govern leases where residence is incidental to another primary purpose. *See id.* § 1.202 & Comment (exclusion from application of URLTA).

[158] See discussion in note 76 *supra. See also* Fillette, *North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations,* 56 N.C.L. REV. 785, 797-800 (1978).

[159] URLTA § 5.101.

[160] 237 A.2d 834 (D.C. Ct. App. 1968).

for nonpayment of rent. The landlord knew at the time the lease was signed that defects in violation of the housing code existed in the premises. Based on a provision of the housing code that "no person shall rent premises unless in a clean, safe, and sanitary condition," the court held:

> To uphold the validity of this lease agreement, in light of the defects known to be existing on the leasehold prior to the agreement . . . would be to flout the evident purposes for which Sections 2304 and 2501 were enacted. The more reasonable view is, therefore, that where such conditions exist . . . these Sections do indeed 'imply a prohibition' so as 'to render the prohibited act void.'[161]

The court found that the lease was void as an illegal contract and conferred no rights on the landlord; thus, the landlord's suit for back rent failed.[162]

Using the *Brown* illegality concept, a few commentators have questioned whether the warranty of habitability may apply to premises uninhabitable when the tenant moves in, reasoning that neither landlord nor tenant may be afforded relief under an illegal contract.[163] These concerns appear to be academic; no court has explicitly limited the warranty to defects arising during the lease. Indeed, a number of courts have specifically placed prior defects within the scope of the warranty.[164] The rule that "neither party to an illegal contract may obtain relief" has been distinguished in the landlord-tenant relationship. In *Glyco v. Schultz*,[165] for example, the court based its holding for the tenant upon a finding of breach of implied warranty as well as upon a finding of illegality of contract. The court stated that under either theory the tenant was entitled to damages or to a reduction in rent.[166] The court avoided the traditional no-recovery rule by holding that "where the statute in question is for the protection of one of the parties and where that party has no real choice but to acquiesce in the illegality, then he will not be held to be in pari delicto and denied relief."[167] Thus, the illegal contract

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[161] *Id.* at 837. *See also* Longenecker v. Hardin, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1970).

[162] 237 A.2d at 837.

[163] *See* Note, *Landlord's Violation of Housing Code During Lease Term Is Breach of Implied Warranty of Habitability Constituting Partial or Total Defense to an Eviction Based on Nonpayment of Rent*, 84 HARV. L. REV. 729, 735-36 (1971).

[164] *E.g.*, Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 843 (1973); King v. Moorehead, 495 S.W.2d 65, 75 (Mo. App. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 252 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526, 534 (1970); Foisy v. Wyman, 83 Wash. 22, 515 P.2d 160, 164 (1973).

[165] 35 Ohio Misc. 25, 289 N.E.2d 919 (1972).

[166] 289 N.E.2d at 920.

[167] *Id.* at 924.

doctrine may be simply another manner of providing relief to the tenant, and not the threat that some commentators have feared.[168]

IV. Habitability in Mississippi

A. *The Search Has Begun*

For years Mississippi has adhered to the common law concept of caveat lessee[169] and its companion rules that no warranty of habitability is implied in a lease[170] and that the landlord is under no implied duty to repair.[171] Yet, as courts in other jurisdictions prior to the adoption of the implied warranty did, the Mississippi judiciary has made modest attempts to provide tenants relief from the harshness of the common law rules.[172] But the court's unwavering adherence to the common law view

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[168] *See generally* Note, *supra* note 163.

[169] The Mississippi Supreme Court first articulated the concept almost a century ago in Jones v. Millsaps, 71 Miss. 10, 14 So. 440 (1893):

> The general rule is firmly established that no implied covenant for repairs can be raised against the lessor. The lessee cannot invoke an implied covenant of the landlord that the leased premises are fit and suitable for the lessee's business and use. The intending tenant must use his own faculties, and judge for himself if the premises he desires to lease are in repair, and are suitable for his use.

Id. at 18, 14 So. at 441. Caveat lessee is still the general rule. *E.g.*, Hurst v. English, 357 So. 2d 132, 134 (Miss. 1978); Wilbourn v. Hardin, 234 So. 2d 606, 608-09 (Miss. 1970). One recognized exception to the concept is that a landlord is under a duty to disclose latent defects. Rich v. Swalm, 161 Miss. 505, 516, 137 So. 325, 326 (1930).

[170] *E.g.*, Causey v. Norwood, 170 Miss. 874, 879, 156 So. 592, 593 (1934) ("This state is committed to the doctrine that the lessor of a building does not warrant the building to be in a good condition for the purposes of the lessee . . . ."); *see* Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 837, 131 So. 350, 355-56 (1930) (fact that building was leased to be used as theatre, but could not be used because it was constructed in violation of city ordinance did not absolve tenant of duty to pay rent); Jones v. Millsaps, 71 Miss. 10, 18, 14 So. 440, 441 (1893) (rejecting argument that lease of only part of dwelling contained an implied warranty, court stated that tenant's protection was limited to express covenants); *cf.* Louisiana Oil Corp. v. Rayner, 159 Miss. 783, 795, 132 So. 739, 741-42 (1931) (affirming judgment for tenant against lessor for breach of implied warranty of fitness of service station under consignment, court stated: "We do not mean to trench on the principle . . . that in a lease contract there is no implied warranty on the part of the landlord of the fitness of the premises . . . . The soundness of these decisions is not questioned.").

[171] *E.g.*, Floyd v. Lusk, 190 So. 2d 451, 452 (Miss. 1966); Rich v. Swalm, 161 Miss. 505, 516, 137 So. 325, 326 (1930); *cf.* Miller v. Miller, 217 Miss. 650, 659, 64 So. 2d 739, 743 (1953) (dictum) ("[I]n the absence of an agreement on the part of the landlord to make repairs, the burden of making repairs upon the leased premises usually falls upon the tenant . . . .").

[172] For example, the court has recognized the doctrine of constructive eviction, designed to circumvent the common law view of covenants in leases as mutually dependent. *See, e.g.*, Perkins v. Blackledge, 285 So. 2d 761, 764 (Miss. 1973) (dictum) (landlord's proffered instruction in suit for rent was too broad since it omitted any reference to

of a lease as primarily a conveyance[173] of an interest in land has prevented[174] any significant degree of reform of landlord-tenant law in Mississippi.

In related areas traditionally governed by property law principles, however, the court has retreated from the doctrine of caveat emptor. In 1974, Justice Inzer observed that "the maxim of caveat emptor has been gradually restricted and circumvented until it is now a mere shadow of itself."[175] In the 1978 term in *Brown v. Chalk*[176] the court heeded Justice Inzer's remarks[177] and held that "as between the builder-vendor of a new home and his vendee there is an implied warranty that the home was built in a workmanlike manner and that it is suitable for habitation."[178] Since in numerous other jurisdictions prior recognition of an implied warranty in sales of new houses has served as an impetus[179] for

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constructive eviction); *cf.* Kiernan v. Germain, 61 Miss. 498, 503-04 (1884) (although tenant's failure to abandon premises promptly after landlord's breach of express covenant to repair precluded constructive eviction defense, tenant could "recoup the demand for rent because of depreciation" in the value of the premises). See notes 27 & 28 and accompanying text *supra* for a general discussion of the doctrine of constructive eviction. The court has not explicitly confronted the issue of whether covenants in a lease should be construed as dependent, since leases are considered to be governed by traditional real property principles. See notes 169 through 171 and accompanying text *supra*. If the landlord voluntarily undertakes to make repairs, however, he is liable for failure to exercise reasonable care in making them. Kassis v. Perronnee, 209 So. 2d 444, 446 (Miss. 1968). But "[t]his [rule] is based upon the principle of liability for negligence, and not because of any implied covenant to repair . . . ." Green v. Long, 152 Miss. 117, 119, 118 So. 705, 706 (1928).

[173] *See, e.g.*, Rich v. Swalm, 161 Miss. 505, 516, 137 So. 325, 327 (1930) ("the relation created by a lease is substantially similar to that created by a deed or a contract for the sale of real property with the right to possession").

[174] The inherent confusion in the law resulting from the constraints of common law principles is perhaps best illustrated in the case of Hodges v. Hilton, 173 Miss. 343, 161 So. 686 (1935). In *Hodges*, the landlord breached an express covenant to make specific repairs and the tenant sustained personal injuries because of the defective condition of the premises. The tenant sued ex contractu, but alleged negligence. The court affirmed dismissal of the landlord's demurrer, stating that "[t]he contract to make these specific repairs gave the lessor control over the premises for that purpose, and her negligent failure to discharge the duty so assumed gave rise to an action in tort." *Id.* at 349, 161 So. at 687.

[175] Oliver v. City Builders, Inc. 303 So. 2d 466, 469 (Miss. 1974) (Inzer, J., specially concurring) (proposing adoption of implied warranty in sales contract between builder-vendor and first purchaser of house).

[176] 358 So. 2d 721 (Miss. 1978).

[177] *Id.* at 722.

[178] *Id.*

[179] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1174, 111 Cal. Rptr. 704 (1974); Mease v. Fox, 200 N.W.2d 791, 795 (Iowa 1972); King v. Moorehead, 495 S.W.2d 65, 75 (Mo. App. 1973); Pugh v. Holmes, 384 A.2d 1234, 1239 (Pa. Super. 1978).

judicial adoption of the implied warranty of habitability in leases, the *Brown* decision may be viewed as foreshadowing the adoption of the warranty of habitability in leases in Mississippi.

In addition to the judiciary's attempts to provide tenants relief and its retreat from the strict application of common law principles, the state legislature has recognized the need to upgrade the quality of rental dwellings and to accomodate the rapidly changing housing situation. The primary statute, section 21-19-25 of the Mississippi code, authorizes municipalities to adopt housing codes.[180] Pursuant to this section, several municipalities[181] have adopted modified versions of the Southern Standard Housing Code.[182] The codes typically provide for abatement of unsafe dwellings by repair and rehabilitation or demolition at the owner's expense[183] upon a finding by the Building Official that the dwelling is "unfit for human habitation."[184] Unless a public officer initiates proceedings, five residents of the municipality must petition the Building Official to set the abatement procedure in motion.[185]

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[180] MISS. CODE ANN. § 21-19-25 (1972) provides in part: "Any municipality . . . may, in the discretion of its governing authorities, adopt building codes, plumbing codes, electrical codes, gas codes, sanitary codes, or any other codes dealing with general public health, safety or welfare . . . ." The authority to adopt housing codes is derived from the "any other codes" provision.

[181] *See, e.g.*, BILOXI, MISS., CODE §§ 6-32 to -38 (1960); JACKSON MISS., CODE § 9-164 (1971 & Supp. 1978); NATCHEZ, MISS., CODE § 35-1 (1969 & 1978 Supp.); OXFORD, MISS., CODE § 34-11 (1968 & Supp. 1979); VICKSBURG, MISS., CODE ch. 10A (1959 & Supp. 1978).

[182] See codes cited in note 181 *supra*. A nationally recognized model code, the Southern Standard Housing Code, was printed in 1960-61 and is revised yearly by the Southern Building Code Congress, 1116 Brown-Marx Building, Birmingham, Alabama 35203. *See generally* R. Sanderson, *supra* note 32, at 37-50 (discussion of model codes).

[183] The abatement procedure was upheld against a constitutionally based attack in Bond v. City of Moss Point, 240 So. 2d 270 (Miss. 1970), wherein the court stated:

> It is a sensible and reasonable rule that where the property owner . . . fails and refuses to either repair or remove an unsafe and unfit building that constitutes a public nuisance, that the municipality can remove it at the owner's expense. Otherwise the property owner could enjoy the profits from his building during its useful life and then neglect or abandon it in its old age and demand that the municipality, at the expense of all taxpayers, compensate him for it or remove it . . . .

Id. at 273. (quoting City of Chicago v. James E. Mulligan Enterprises, Inc., 27 Ill. App. 2d 481, 170 N.E.2d 13 (1960)).

[184] A determination that a dwelling is unfit for human habitation can be based upon conditions that are "dangerous or injurious to the health, safety or morals of the persons using such dwellings for human habitation or to the public." Such conditions may include, but are not limited to, defects that increase "the hazards of fire; accidents; or other calamities; lack of adequate ventilation, light, or sanitary facilities; dilapidation, disrepair, structural defects and uncleanliness." BILOXI, MISS., CODE § 6-36 (1960); *accord*, JACKSON, MISS., CODE § 9-164.1, ¶ 103.2 (1971 & Supp. 1978); VICKSBURG, MISS., CODE ch. 10A-28(a) (1959 & Supp. 1978).

[185] *See, e.g.*, BILOXI, MISS., CODE § 6-35 (1960). Some of the codes also provide crimi-

Although these codes delineate the usual standards of habitability,[186] their exclusive reliance upon public officials for enforcement reduces their utility to a police power measure against public nuisances or "external inhabitability." The codes do not give rise to effective administrative[187] or contractual[188] relief for individual tenants. Moreover, even if the codes' habitability requirements could be effectively enforced, since section 21-19-25 does not even suggest adoption of habitability standards and since it authorizes only municipalities to adopt codes,[189] the potential success of a tenant's search for a habitatable home in Mississippi may depend entirely upon where the tenant lives.

Two other statutory schemes in Mississippi reflect a legislative judgment that adequate housing for tenants is desirable. First, the Housing Authorities Law[190] authorizes the creation of local housing authorities[191] and empowers the authorities to conduct various housing projects[192] for low-income tenants[193] if it is found "(a) that unsanitary or unsafe inhabited dwellings exist . . . or (b) that there is a shortage of safe or sanitary dwelling accommodations . . . available to persons of low income . . . ."[194] Second, the Urban Renewal Law[195] creates munici-

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nal sanctions. *See, e.g.*, OXFORD, MISS., CODE § 34-11 (1968 & Supp. 1979) ($300 and/or 90 days).

[186] *Compare* statutes cited in note 181 *supra with* notes 86 through 113 and accompanying text *supra*.

[187] Assuming that a tenant could persuade four other residents of the municipality to petition the Building Official, and assuming that the tenant's allegations of uninhabitability were sustained, the available relief would not ensure that the dwelling would be made habitable. Imposition of fines upon landlords has proved ineffective as an inducement to make repairs, *see* Gribetz & Grad, *supra* note 31, at 1262-63, so the tenant would probably have to convince the municipality to seek judicial sanctions to force the landlord to make repairs. Moreover, the tenant has no protection against retaliatory measures by the landlord, such as rent increase, diminution in the use of the premises, or eviction; thus, the tenant's efforts, regardless of "success," might only be rewarded by the loss of an uninhabitable house rather than by the gain of a habitable one.

[188] In Goode v. Castlewood Arms, Inc., 339 So. 2d 563 (Miss. 1976), the court indicated that a tenant may sue his landlord for negligence because of the landlord's failure to comply with housing code requirements. *Id.* at 564. Although perhaps indicative of the court's concern for tenants, this approach provides little practical relief for problems arising out of contract.

[189] See note 180 *supra*.

[190] MISS. CODE ANN. §§ 43-33-1 to -307 (1972).

[191] *Id.* § 43-33-5.

[192] *Id.* § 43-33-11.

[193] *Id.* § 43-33-15. Low-income tenants are families "whose net annual income . . . less an exemption of one hundred dollars ($100.00) for each minor . . . does not exceed five times the annual rental (including the value or cost to them of water, electricity, gas, other heating and cooking fuels, and other utilities) of the dwellings to be furnished." *Id.*

[194] *Id.* § 43-33-5.

[195] *Id.* §§ 43-35-1 through -37 (1972 & Supp. 1978). *See also id.* §§ 43-35-101 through

pal urban renewal agencies[196] and confers police power upon the agencies to eliminate substandard housing through the clearance of slums and blighted areas.[197] Like section 21-19-25, however, these statutes rely exclusively upon local administrative initiative for enforcement and are designed for community redevelopment rather than reform of the landlord-tenant relationship.

These attempts at reform, although ineffective in providing the necessary relief for tenants, do indicate a recognition of the plight of tenants and the untenable position they occupy under the common law.

B. The Next Step in the Law

Because of the continued adherence to common law principles and the ineffectiveness of housing codes as a remedy, tenants in Mississippi remain in virtually the same position that they have occupied for a century[198]—without bargaining power, without a guarantee of a habitable home, and with no effective means to require a landlord to provide repairs or maintenance. Application of the outmoded common law theories of the landlord-tenant relationship is inconsistent with the needs of tenants in modern society and the purposes of a lease of residential property.[199] The imbalance in bargaining power between landlord and

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-117 (1972) ("Slum Clearance"); *id.* §§ 43-39-1 through -27 (Supp. 1978) ("Relocation Assistance Law").

[196] *Id.* § 43-35-33 (Supp. 1978).

[197] Section 43-35-5 sets forth the following "Findings and declarations of necessity":

> It is hereby found and declared that there exist in municipalities of the state slum and blighted areas which constitute a serious and growing menance . . . and that the prevention and elimination of slums and blight is a matter of state policy and state concern in order that the state and its municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, and consume an excessive proportion of its revenues . . . .
>
> It is further found and declared that certain slum or blighted areas, or portions thereof, may require acquisition, clearance, and disposition subject to use restrictions, as provided in this article, since the prevailing condition of decay may make impracticable the reclamation of the area by conservation or rehabilitation; that other areas or portions thereof may, through the means provided in this article, be susceptible of conservation or rehabilitation in such a manner that the conditions and evils hereinbefore enumerated may be eliminated, remedied or prevented; and that salvable slum and blighted areas can be conserved and rehabilitated through appropriate public action as authorized in this article, and the cooperation and voluntary action of the owners and tenants of property in such areas.
>
> It is further found . . . that the powers conferred by this article [may be enforced through the state's exercise of the power of eminent domain].

[198] See note 169 *supra*.

[199] See notes 22 & 23, and notes 50 through 57 and accompanying text *supra*.

tenant need not, however, remain static. Should the Mississippi judiciary "reappraise old doctrines in the light of . . . contemporary life,"[200] it is probable that the court will find that the implied warranty of habitability is a necessary ingredient in a lease of residential property.

Imposition of the warranty in Mississippi would follow logically from the decisions in other jurisdictions[201] and the tentative move away from the common law in Mississippi.[202] The Mississippi court has circumvented the common law restrictions by utilizing the doctrine of constructive eviction[203] and has rejected the rule of caveat emptor in the sale of new homes.[204] Additionally, the Mississippi legislature has indicated, through enactment of housing statutes, that public policy requires that Mississippians be provided with habitable dwelling places.[205] From these beginnings, recognition of the implied warranty of habitability in residential leases does not constitute a "complete and sudden break with the past, but only the next step in the law."[206] That step, made in the overwhelming majority of the states,[207] would align Mississippi with what is no longer a trend, but the well-established majority rule.

Conclusion

Until recent years, tenants have constituted a substantial though disadvantaged segment of the population throughout the United States. The inequality in bargaining power between landlord and tenant has been ameliorated in most states and similar reform is now both possible and much needed in Mississippi. Imposition of the implied warranty of habitability, a logical step in the reformation of antiquated common law principles, would be of incalculable benefit in providing the tenant with an effective remedy against the more powerful landlord. If this progressive step is taken, the tenant's search for a habitable home in Mississippi should be concluded and the quality of housing available in Mississippi will no longer constitute "an indictment of our civilization."[208]

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[200] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[201] See note 48 *supra*.

[202] See notes 172 through 178 and accompanying text *supra*.

[203] See note 172 *supra*.

[204] See notes 176 through 178 and accompanying text *supra*.

[205] See notes 180 through 197 and accompanying text *supra*.

[206] Pugh v. Holmes, 384 A.2d 1234, 1239 (Pa. Super. 1978).

[207] See notes 48 & 49 and accompanying text *supra*.

[208] See note 1 and accompanying text *supra*.

FEDERAL TAXATION OF POLITICAL CAMPAIGN ORGANIZATIONS

Prior to 1972, the few existing federal,[1] state and local laws dealing with political campaigns were weak and ineffective.[2] Over the past few years, numerous election laws containing strict reporting, disclosure and taxation provisions have been enacted at all levels of government. This metamorphosis in the election campaign laws began in 1972, the effective date of the Federal Election Campaign Act of 1971.[3] Amended, supplemented and reinforced by passage of the 1974[4] and 1976[5] Federal Election Campaign Act Amendments,[6] the Act now requires adherence to complex reporting and disclosure procedures, requires maintenance of detailed accounting records and places specific limits on the types and amounts of contributions made to and expenditures made by political campaign organizations. In addition, the Act established the Federal Election Commission to implement and enforce the new provisions.[7]

The federal tax provisions in the amended Act reflect the public pressure for political campaign reform that gave rise to various state and local political campaign laws.[8] The enactment of these state laws was designed to stimulate broader voter participation in the financing of political campaigns by reducing the role of large contributors and enhancing the role of small contributors.[9] As a result, the Internal Revenue

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[1] While theoretically providing for strict contribution limitations and reporting requirements with respect to federal election campaigns, the obsolete Federal Corrupt Practices Act of 1925 contained numerous loopholes and was so difficult to enforce that it was of practically no significance. *See* Wagman, *Political Campaign Accounting—New Opportunities for the CPA,* J. OF ACCOUNTANCY, March, 1976, at 36-37.

[2] *Id.*

[3] Pub. L. No. 92-225, 86 Stat. 3 (1972) (amended 1974 and 1976) (codified in scattered sections of 2, 18, 47 U.S.C.).

[4] Act of Oct. 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[5] Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (codified in scattered sections of 2, 8, 26 U.S.C.).

[6] *See* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, COMPLIANCE WITH FEDERAL ELECTION CAMPAIGN REQUIREMENTS: A GUIDE FOR CANDIDATES 2 (1976) [hereinafter cited as A.I.C.P.A. COMPLIANCE MANUAL]; Wagman, *supra* note 1, at 37.

[7] A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 2-3; Wagman, *supra* note 1, at 37. *But see* Buckley v. Valeo, 424 U.S. 1, 58-59 (1976) (upholding the Act's major provisions but invalidating the expenditure limitations of the 1971 Act and the 1974 amendment).

[8] *See* Wagman, *supra* note 1, at 38. Forty-four states have since 1972 enacted laws regulating election campaigns. Only one state does not have such a law, and several of the states which had existing political campaign laws have strengthened them. *Id.* Many of these state laws also limit the type and amounts of contributions and expenditures, *id.*, and unlike the federal laws, require mandatory disclosure by political candidates of personal financial information. A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 3.

[9] *See* Comment, *Taxing Political Contributions: The IRS Balks at Reform,* 23 CATH. U.L. REV. 322, 337-38 (1973).

Service has been thrust into the center of current efforts to reform the financing of political campaigns.[10] The amended Act is further evidence of the government's increasing utilization of the tax system to affect the financing of political campaigns.[11]

In an effort to clarify this area of the law, this Comment will examine and analyze the significant provisions of the federal tax laws that are applicable to election campaigns at the federal, state and local levels. An examination of provisions concerning the taxation of political campaigns under state or local tax laws is, however, beyond the scope of this paper.[12]

I. The Political Campaign Organization

A. *History*

Prior to 1974, the IRS did not tax the income of political campaign organizations.[13] The IRS first officially announced this position in 1939[14] by publishing the statement that "a political gift received by an individual or a political organization is not taxable income to the recipient."[15] The statement was followed in 1948 by a nonpublic directive to IRS field offices that political campaign organizations were not subject to the filing requirements of federal tax law.[16] Two theories provided possible bases for the IRS position: (1) political campaign organizations are short-lived entities whose income is generally equivalent to or exceeded by expenses[17] so that they operate either with no taxable income or with

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[10] *Id.* at 334-36.

[11] These federal campaign laws are also of practical significance in view of the number of election campaigns and the disastrous consequences that the candidate, the campaign organization, and the campaign's contributors may face upon failing to comply with the provisions. *See* Wagman, *supra* note 1, at 40-41.

[12] The following subjects are also outside of the scope of this Comment: (1) taxation of the office holder, see A.I.C.P.A. Compliance Manual, *supra* note 6, at 56-62; (2) the Presidential Election Campaign Fund Act of 1974, I.R.C. §§ 9001-9013 (dealing with the financing of presidential elections out of "check-offs" by individual taxpayers); and (3) the Presidential Primary Matching Payment Account Act of 1974, I.R.C. §§ 9031-9042 (dealing with the financing of presidential primaries).

[13] *See* Kaplan, *Taxation and Political Campaigns: Interface Resolved,* 53 Taxes 340, 344 (1975); Comment, *supra* note 9, at 329. This failure to tax was probably due to the fact that the precise tax status of political campaign organizations was not specifically defined by any provision of the Internal Revenue Code. *See* A.I.C.P.A. Compliance Manual, *supra* note 6, at 47.

[14] I.T. 3276, 1939-1 C.B. 108.

[15] *Id.* at 108.

[16] *See* Announcement 73-84, 1973-2 C.B. 461, 461; Streng, *The Federal Tax Treatment of Political Contributions and Political Organizations,* 29 Tax Law. 139, 142 n.21 (1975).

[17] Streng, *supra* note 16, at 141, 147-48.

a deficit, and (2) political campaign organizations have no taxable income because their receipts are all nontaxable gifts[18] under section 102(a).[19] However, the position taken by the IRS ignored the possibility that a political campaign organization might also receive income nongratuitously from such sources as interest, capital gains and dividends.[20]

This nontaxability position was difficult to defend statutorily or constitutionally.[21] The Internal Revenue Code taxes all income except those types of income specifically exempted from its provisions.[22] During the period that the IRS espoused nontaxability for political campaign organizations, section 501(c)[23] of the Internal Revenue Code, which provided the exclusive method for qualification as a tax-exempt organization,[24] did not exempt political campaign organizations.[25] In fact, that section specifically stated that the enumerated organizations did not qualify for tax-exempt status if they participated in any political campaign.[26] Since Congress had not specifically exempted political campaign organizations, they should have been subject to taxation as within the ambit of the tax statutes.[27] Notwithstanding their function in the democratic process, political campaign organizations have no intrinsic characteristics that should exempt them from the operation of a theoretically nondiscriminatory tax system.[28]

The IRS shifted its position in the 1950s and 1960s by attempting selective and politically motivated enforcement of the tax laws in an effort to discriminate against certain political organizations, most notably the Communist Party.[29] In the resulting litigation, the IRS made the unequivocal argument that all political organizations were taxable asso-

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[18] H.R. REP. No. 1502, 93d Cong., 2d Sess. 104 (1974); S. REP. 7478, No. 1357, 93d Cong., 2d Sess. 25 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7501-02; Streng, *supra* note 16, at 148.

[19] I.R.C. § 102(a) (property acquired by gift excluded from gross income).

[20] Streng, *supra* note 16, at 141-42.

[21] *See* Comment, *supra* note 9, at 329.

[22] I.R.C. § 61(a).

[23] I.R.C. § 501(c).

[24] *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 47-48; Streng, *supra* note 16, at 141.

[25] Streng, *supra* note 16, at 141.

[26] I.R.C. § 501(c)(3). The importance of this provision is emphasized by Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1959) (precluding from tax-exempt status those organizations involved in "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office"). *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 47-48; Streng, *supra* note 16, at 141 n.17.

[27] Comment, *supra* note 9, at 329 & n.41.

[28] *Id.* at n.41.

[29] *See* Kaplan, *supra* note 13, at 344 n.31 (collection of case citations); Streng, *supra* note 16, at 142; Comment, *supra* note 9, at 329-30.

ciations and were not exempted by any statute, regulation or ruling.[30] Then, in 1968, the Service issued Revenue Procedure 68-19,[31] the first official indication by the IRS that political campaign organizations might be required to file federal tax returns.[32] The position adopted by the Service was that all political campaign organizations "may" report interest income or unexpended political campaign funds[33] set aside in a separate bank account by filing a U.S. Fiduciary Income Tax Return.[34]

The ambiguity of Revenue Procedure 68-19 was clarified in 1973 when the Commissioner issued a policy statement announcing that political campaign organizations were required to file "appropriate" tax returns.[35] Under this policy, the organizations were required to report and pay income taxes on dividend and interest income, income from supplementary activities, and gains from the sale of contributed, appreciated property for taxable years after 1971.[36] Although the Service had previously held in several private rulings that interest income from campaign funds was taxable,[37] the new policy announcement was the first public indication that the shift in position was complete.[38]

The rules implementing the new policy of taxability were published in the form of four 1974 revenue rulings.[39] The IRS definitively ruled in Revenue Ruling 74-21[40] that political campaign organizations[41] were not exempt from income taxation and were required to file tax returns for all tax years subsequent to 1971. The IRS stated that the reasons for adopting the policy were: (1) the section 501 guidelines for qualification as a tax-exempt organization did not exempt political campaign organizations but, instead, specifically denied exemption to organizations in-

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[30] Communist Party v. Commissioner, 373 F.2d 682, 684 (D.C. Cir. 1967). *See generally* Streng, *supra* note 16, at 142; Comment, *supra* note 9, at 330.

[31] Rev. Proc. 68-19, 1968-1 C.B. 810.

[32] *See* Streng, *supra* note 16, at 142.

[33] The impact of the Revenue Procedure was very slight since most political campaign organizations either managed merely to break even or incurred a deficit. *See* Kaplan, *supra* note 13, at 344.

[34] Rev. Proc. 68-19, 1968-1 C.B. 810, 811.

[35] Announcement 73-84, 1973-2 C.B. 461, 461.

[36] *Id.* For a discussion of the problems surrounding contributions of appreciated property, see notes 316 through 325 and accompanying text *infra*.

[37] *See* Announcement 73-84, 1973-2 C.B. 461, 461; Streng, *supra* note 16, at 142 n.21.

[38] *See* Streng, *supra* note 16, at 143.

[39] Rev. Rul. 74-475, 1974-2 C.B. 23; Rev. Rul. 74-23, 1974-1 C.B. 17; Rev. Rul. 74-22, 1974-1 C.B. 16; Rev. Rul. 74-21, 1974-1 C.B. 14.

[40] Rev. Rul. 74-21, 1974-1 C.B. 14.

[41] While the distinction between a political campaign fund held by an organization or by an individual is artificial, the political campaign fund controlled by an individual, which is the subject of Rev. Rul. 74-23, *supra* note 39, will be discussed in connection with the taxation of the political candidate. See notes 123-60 and accompanying text *infra*.

volved in influencing elections, and (2) no other tax statute or judicial decision exempted political campaign organizations from income tax liability.[42]

The recognition of the taxability of political campaign organizations gave rise to some novel questions concerning the classification of the organizations as taxable entities,[43] the determination of which items of income should be included in their gross income,[44] and deductibility of the organizations' expenses. In an attempt to provide guidelines, the IRS ruled in Revenue Ruling 74-21 that unincorporated political campaign organizations were to be treated generally as associations taxable as corporations,[45] while ultimate categorization as a tax entity was to be based on the specific facts and circumstances of each case.[46]

Although political contributions were to be excluded from the gross income of the organization,[47] interest and dividend income as well as net gains from the sale of securities were ruled includible.[48] Curiously, other common categories of passive income were not considered.[49] With respect to the deductibility of a political campaign organization's expenses, Revenue Ruling 74-21 drew a distinction between campaign expenditures and investment expenses.[50] Expenses directly related to the production of dividend or interest income or gains from the sale of securities were ruled deductible;[51] however, expenses incurred for campaign purposes were ruled nondeductible[52] on the basis of section 162(e)(2), which specifically disallows deductions for campaign expenditures.[53]

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[42] Rev. Rul. 74-21, 1974-1 C.B. 14, 15.

[43] Classification of the campaign organization as a particular variety of tax entity became highly significant since classification of a tax entity determines the tax rate structure to be applied in calculating its income tax liability. See Streng, *supra* note 16, at 154 n.90 for a discussion of the types of tax entities and the characteristics of each.

[44] *Id.* at 147.

[45] Rev. Rul. 74-21, 1974-1 C.B. 14, 15-16 (Form 1120, U.S. Corporation Income Tax Return).

[46] *Id.* at 15 (determination made through an application of the criteria contained in the regulations under § 7701).

[47] Rev. Rul. 74-21, 1974-1 C.B. 14, 16.

[48] *Id.*

[49] Streng, *supra* note 16, at 151 (*e.g.*, rents, royalties, and gains from the sale of property other than securities).

[50] Rev. Rul. 74-21, 1974-1 C.B. 14, 16; *see* Streng, *supra* note 16, at 153.

[51] Rev. Rul. 74-21, 1974-1 C.B. 14, 16.

[52] Rev. Rul. 74-21, 1974-1 C.B. 14, 15; Streng, *supra* note 16, at 152.

[53] I.R.C. § 162(e)(2) provides in part that no deduction is allowed for any amount paid "for participation in, or intervention in, any political campaign on behalf of any candidate for public office." *See* Treas. Reg. § 1.162-20(c)(1) (1965) (emphasizing the nondeductibility of such expenses).

B. *Present Law*

On January 3, 1975, Congress responded to the position of the IRS by enacting section 527 of the Internal Revenue Code.[54] This section provided entirely new and detailed statutory rules governing the taxation of political campaign organizations. In this statute Congress recognized that the financing of a political campaign is not a trade or business that should be taxed,[55] and therefore elected to treat political campaign organizations as tax-exempt.[56] However, Congress also determined that since political campaign organizations may receive some income from nonpolitical activities, net investment income should be subject to taxation.[57]

Under section 527 a political campaign organization qualifies for tax-exempt status if it meets the "primary purpose" test, which requires that the organization be "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."[58] This definition encompasses political parties, committees, associations, funds,[59] and any other similar political organization.[60] Qualification does not depend upon the formal establishment of the organization under articles of incorporation or a charter.[61] While the organization may be involved in both raising and expending funds, it is not required to be engaged in both to qualify for tax-exempt status.[62] Furthermore, the raising or expending of funds for campaign purposes may be either direct or indirect.[63] For example, a national organization that receives political contributions through local

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[54] Act of Jan. 3, 1975, Pub. L. No. 93-625, § 10(e), 88 Stat. 2108 (codified at I.R.C. § 527).

[55] S. REP. NO. 1357, *supra* note 18, at 26, U.S. CODE CONG. & AD. NEWS at 7502.

[56] I.R.C. § 527(a) provides: "A political organization shall be subject to taxation under this subtitle [income tax] only to the extent provided in this section. A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes."

[57] I.R.C. § 527(c); *see* S. REP. NO. 1357, *supra* note 18, at 26, U.S. CODE CONG. & AD. NEWS at 7502.

[58] I.R.C. § 527(e)(1).

[59] A political fund includes a trust of an individual candidate, S. REP. NO. 1357, *supra* note 18, at 26, U.S. CODE CONG. & AD. NEWS at 7502, and segregated funds established by an individual candidate, Prop. Treas. Reg. § 1.527-2(a)(1) (1976), or pursuant to I.R.C. § 527(f)(3).

[60] I.R.C. § 527(e)(1).

[61] *Id.; see* S. REP. NO. 1357, *supra* note 18, at 26, U.S. CODE CONG. & AD. NEWS at 7503.

[62] I.R.C. § 527(e)(1); *see* S. REP. NO. 1357, *supra* note 18, at 27, U.S. CODE CONG. & AD. NEWS at 7503.

[63] I.R.C. § 527(e)(1); *see* S. REP. NO. 1357, *supra* note 18, at 27, U.S. CODE CONG. & AD. NEWS at 7503.

political organizations or transfers funds to local political organizations for campaign expenditures would qualify under section 527.[64] Additionally, since the organization must meet only the "primary purpose" test, it is not necessary that it be exclusively political.[65] If the organization's "primary purpose" is the receiving of contributions or the making of expenditures with respect to a political candidate's campaign, the organization may also engage in incidental social activities or support the passage or defeat of a proposition on the ballot.[66] Finally, an organization that has been organized solely for a single campaign will remain qualified during the postelection period while in the process of terminating its activities.[67] Similarly, a permanent organization not supporting any specific candidate will remain qualified during the period between elections so long as its activities are related to the nomination or election of political candidates.[68] Any other issues regarding the satisfaction of the "primary purpose" test will apparently be resolved on a case-by-case basis.[69]

In general, the taxable income of a political organization qualifying under section 527 is its gross income, excluding "exempt function income," less a $100 specific deduction[70] and any otherwise allowable deductions.[71] The "exempt function income" of a political organization is not taxed if it is segregated in separate accounts and used only for campaign purposes.[72] A major item of "exempt function income" consists of contributions, as defined in section 271(b)(2),[73] of money, or

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[64] S. REP. No. 1357, *supra* note 18, at 27, U.S. CODE CONG. & AD. NEWS at 7503. However, Congress has cautioned that it is the responsibility of the organization transferring funds to take such reasonable care as is required to insure that the funds transferred are spent for campaign purposes. *Id.*, U.S. CODE CONG. & AD. NEWS at 7503.

[65] *Id.*, U.S. CODE CONG. & AD. NEWS at 7503.

[66] *Id.*, U.S. CODE CONG. & AD. NEWS at 7503.

[67] *Id.*, U.S. CODE CONG. & AD. NEWS at 7503.

[68] *Id.*, U.S. CODE CONG. & AD. NEWS at 7503 (*e.g.*, preparing for the next convention of the party, the transacting of party business, and engaging in fund raising activities). It is immaterial whether the candidates supported by the political organization are nominated or elected. I.R.C. § 527(e)(2).

[69] Prop. Treas. Reg. § 1.527-2(a)(4) (1976).

[70] I.R.C. § 527(c)(2)(A).

[71] A political organization is not entitled to a net operating loss deduction under I.R.C. § 172 or other special corporate deductions such as the 85% dividends received deduction. I.R.C. § 527(c)(2)(B)-(C).

[72] I.R.C. § 527(c)(3); S. REP. No. 1357, *supra* note 18, at 27, U.S. CODE CONG. & AD. NEWS at 7504 (nonsegregated funds are not tax-exempt even if used for campaign purposes). As to the tax consequences of a diversion of segregated funds, see notes 124 through 147 and accompanying text *infra*.

[73] I.R.C. § 527(e)(3) provides that the term "contribution" has the same meaning here as under I.R.C. § 271(b)(2), which defines it as "a gift, subscription, loan, advance, or

other property. Furthermore, any funds received by a political organization under any federal, state or local provision for the public financing of political campaigns, such as the one dollar "check off" under federal law, are considered tax-exempt contributions.[74] A second category of "exempt function income" includes membership dues, fees and assessments.[75] Thirdly, any filing fees paid to a political organization directly or indirectly by a candidate are exempt from taxation.[76] Proceeds from political fund raising or entertainment events, if not conducted in the ordinary course of a "trade or business," are also exempt.[77] The final category of "exempt function income" includes proceeds from the sale of political campaign materials.[78] To be exempt, sales proceeds must be substantially related to some other political activity of the organization such as the organizing of voters or the distributing of political literature.[79]

Under the statutory scheme, nonexempt income is calculated simply by excluding from gross income all "exempt function income."[80] Thus, a political organization's taxable income consists primarily of investment income.[81] Primary sources of investment income include in-

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deposit, of money, or anything of value, and . . . a contract, promise, or agreement to make a contribution, whether or not legally enforceable."

[74] *See* S. REP. No. 1357, *supra* note 18, at 28, U.S. CODE CONG., & AD. NEWS at 7504.

[75] I.R.C. § 527(c)(3)(B).

[76] If a governmental unit collects a qualifying fee and then transfers a part of the fee to the political organization of the candidate, the amount so transferred is not taxable to the political organization. S. REP. No. 1357, *supra* note 18, at 28, U.S. CODE CONG. & AD. NEWS at 7504. Technically, the committee report classifies such filing or qualifying fees as contributions. *But see* Prop. Treas. Reg. § 1.527-3(b)(3) (1976) (classifying such fees under dues, fees, and assessments).

[77] I.R.C. § 527(c)(3)(C). Entertainment events include telethons, Streng, *supra* note 16, at 150, annual athletic exhibitions, receptions, dances, political breakfasts, annual political dinners, picnics, etc. *See* S. REP. No. 1357, *supra* note 18, at 28, U.S. CODE CONG. & AD. NEWS at 7504. Whether the proceeds of such an event will qualify for this exemption depends upon the extent to which the event is related to a political activity other than the financial requirements of the political organization. *Id.*, U.S. CODE CONG. & AD. NEWS at 7504.

[78] I.R.C. § 527(c)(3)(C). Such materials would include "political memorabilia, bumper stickers, campaign buttons, stationery, jewelry, or cookbooks." S. REP. No. 1357, *supra* note 18, at 28, U.S. CODE CONG. & AD. NEWS at 7504-05. The factors to be considered in determining whether a particular activity is a trade or business in this context include the manner of conducting the event, its frequency—which must be casual and sporadic—and the length of time for which it is conducted. *Id.*, U.S. CODE CONG. & AD. NEWS at 7504-05.

[79] *Id.*, U.S. CODE CONG. & AD. NEWS at 7504-05.

[80] I.R.C. § 527(c)(1)(A); *see* S. REP. No. 1357, *supra* note 18, at 28, U.S. CODE CONG. & AD. NEWS at 7505.

[81] Streng, *supra* note 16, at 150.

terest,[82] rents, capital gains,[83] dividends, royalties, various other categories of passive income unrelated to any political function and any profits from a trade or business includible under section 61(a)[84] in gross income.[85] To compute taxable income, the gross income subject to taxation is reduced by a $100 specific deduction[86] and by any otherwise allowable[87] deductions that are "directly connected" with the political organization's production of taxable gross income.[88] The problem of determining which expenses are "directly connected" with the production of taxable income is not peculiar to this code section;[89] the definition of "directly connected," however, demands strict adherence to the "generally accepted accounting principle requiring that revenues and expenses be matched functionally."[90]

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[82] Otherwise tax-exempt interest paid to political organizations remains tax-exempt. *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 49.

[83] Net gains realized subsequent to August 1, 1973, from the disposition of property are includible in the gross income of a political organization. If the property was contributed prior to May 8, 1974, the gain to be recognized and reported is the excess of the sales price over the adjusted basis to the contributor. If the adjusted basis cannot be ascertained prior to the due date of the return, a zero basis must be used to calculate gain. However, upon a determination of the contributor's basis, the political organization can file a claim for refund within two years from the date of payment of the tax or three years after the date of filing the return, whichever is later. The holding period includes the total time that both the contributor and the political organization held the property. Rev. Rul. 74-21, 1974-1 C.B. 14; *see* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 48-49. Since a post-May 7, 1974, contribution of appreciated property is treated as a sale by the contributor for an amount equal to its fair market value, the basis of the property in the hands of the political organization is a carryover basis, *i.e.* the contributor's basis increased by any gain the contributor recognizes, which will usually be the fair market value of the property at the date of transfer. I.R.C. § 84. A contribution of property the basis of which exceeds fair market value would apparently result in a limitation of its basis to the political organization equal to its fair market value. However, because of the failure of the statute to provide specific guidance, such contributions may be determined by the IRS to constitute gifts. *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 49, 67. In such a situation, the basis to the political organization would be determined under I.R.C. § 1015. For a discussion of the tax treatment to the contributor of a transfer of appreciated property, see notes 316 through 325 and accompanying text *infra*.

[84] I.R.C. § 61(a).

[85] *See* Streng, *supra* note 16, at 150-51.

[86] I.R.C. § 527(c)(2)(A). The apparent justification for this deduction is the elimination of the filing requirements if the candidate in an insignificant election is unaware of these tax provisions, Streng, *supra* note 16, at 153, or where the amount of the taxable income is insignificant.

[87] I.R.C. § 527(c)(2)(B)-(C) specifically disallows both the net operating loss deduction and the dividends received deduction, as well as other special corporate deductions.

[88] I.R.C. § 527(c)(1) & (c)(2)(A).

[89] *See* Streng, *supra* note 16, at 153 n.82.

[90] *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 50. For example, expenditures for an exempt function must be matched against exempt function income and are nonded-

A useful definitional guide provides that a deduction is "directly connected" with an income item if the deduction is "incurred solely as a result of the activities giving rise to such income" item.[91] Under this approach, expenditures such as legal, accounting, or investment counseling fees incurred with respect to nonexempt function income, the litigation expenses of collecting investment income and rental fees for safe deposit boxes necessary to the safekeeping of securities would be deductible.[92] Indirect expenses such as general administrative expenses[93] and wages paid to workers in the political campaign[94] are not deductible.

Once a political organization's taxable income is calculated, the scheme of taxation imposed becomes of primary importance. As previously mentioned, political organizations are to be taxed generally as corporations.[95] Given this classification, the organization's taxable income should be subject to both a normal tax and a surtax,[96] but the surtax exemption allowed a true corporation is disallowed with respect to political organizations.[97] The alternative tax,[98] however, remains available if the political organization has net capital gains.[99]

A political organization required to file a tax return must do so on Form 1120-POL.[100] The due date for this return is identical to that of a

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uctible while expenditures for a nonexempt function must be matched against nonexempt-function income and are deductible.

[91] Prop. Treas. Reg. § 1.527-3(c)(2) (1976).

[92] *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 50.

[93] S. REP. NO. 1357, *supra* note 18, at 29, U.S. CONG. & AD. NEWS at 7505. The rationale for disallowing such deductions seems to be twofold: (1) to avoid potential problems of allocation, and (2) to simplify tax calculations because such amounts are normally relatively small. *Id.*, U.S. CODE CONG. & AD. NEWS at 7505.

[94] *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 50. Although campaign workers' wages are nondeductible because of their relationship to the political organization's exempt function, they are nevertheless subject to the federal tax provisions governing income tax withholdings and employment taxes, such as F.I.C.A. and unemployment taxes. Rev. Rul. 68-190, 1968-1 C.B. 422.

[95] I.R.C. § 527(b)(1).

[96] *Id.*

[97] *Id.* The rationale supporting this policy is that by denying the surtax exemption to political organizations, the proliferation of single-candidate political organizations will be discouraged. *See* S. REP. NO. 1357, *supra* note 18, at 29, U.S. CODE CONG. & AD. NEWS at 7505.

[98] I.R.C. § 1201(a) (30% on net long-term capital gains).

[99] I.R.C. § 527(b)(2). Since a political organization is taxed as a corporation, however, any net capital loss cannot be utilized to reduce taxable income, but can be carried forward for five years to offset any future capital gains. I.R.C. § 1212(a)(1).

[100] [1978] 4 FED. TAXES (P-H) ¶ 21,291, at 21,265. Form 1120-POL should be used for taxable years beginning after December 21, 1974, while Form 1120 should be used for those years beginning after 1971 but prior to 1975. *Id.*

corporation—two and one-half months following the close of the taxable year.[101]

Finally, upon the termination or dissolution of the political organization, any unexpended funds may be returned to the known contributors,[102] contributed to another qualified political organization,[103] contributed to the general fund of the U.S. Treasury or of any state or local government[104] or contributed to an exempt "public charity."[105] The transfer does not result in recognition of income by the transferor political organization.[106] Since the political organization recognizes no income on the transfer, however, it is denied a deduction with respect to the transfer.[107]

C. *Analysis*

The statutory scheme selected by Congress was very similar to the position adopted by the IRS in Revenue Ruling 74-21. Both of these pronouncements subjected political campaign organizations to limited income tax liability. The statute proved, however, to be much more expansive in its characterization of taxable income items. The Revenue Ruling dealt only with interest and dividend income and gains from the sale of securities, while the statute, by negatively defining taxable income as all income except exempt function income, swept all forms of both passive investment income and income from a trade or business within its provisions. From a tax theory standpoint, such a limited tax status is conceptually justifiable since political campaign organizations are functionally more related to section 501(c)[108] tax-exempt organizations than to profit-oriented organizations.[109]

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[101] I.R.C. § 6072(b); A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 48.

[102] Rev. Rul. 74-22, 1974-1 C.B. 16, 16.

[103] I.R.C. § 527(d)(1).

[104] *Id.* § 527(d)(3).

[105] *Id.* § 527(d)(2).

[106] S. REP. No. 1357, *supra* note 18, at 31, U.S. CODE CONG. & AD NEWS at 7507. Neither does such a transfer constitute a diversion of funds from the political organization for the personal use of a candidate or any other party. *Id.*, U.S. CODE CONG. & AD. NEWS at 7507. For a discussion of the tax effects of a diversion of funds for a candidate's personal use, see notes 124 through 147 and accompanying text *infra*.

[107] I.R.C. § 527(d); *see* S. REP. No. 1357, *supra* note 18, at 31, U.S. CODE CONG. & AD. NEWS at 7507.

[108] I.R.C. § 501(c).

[109] Political campaign organizations are similar to those organizations described in section 501(c) in that they: (1) are operated primarily for personal, nonprofit purposes, (2) support a common objective, (3) are financed by their members, and (4) are operated in such a manner that no part of their net receipts inures to the benefit of a contributor. Streng, *supra* note 16, at 144.

As to deductions, the statute and ruling are consistent in denying deductibility for political campaign expenses[110] while permitting the deduction of expenses directly related to the production of taxable income items.[111] The tax treatment afforded deductions also appears to be conceptually correct since it is consistent with both the functional matching of revenues and expenditures required by "generally accepted accounting principles,"[112] and other related tax statutes.[113] Furthermore, the ruling and statute are consistent in classifying political organizations as taxable entities. The ruling had simply provided, however, that such entities were generally to be taxed as corporations, while Congress, recognizing the unique nature of political organizations, elected not to force them into an established classification, and instead created a hybrid taxable entity.[114] Thus, political organizations are generally classified as corporations with corporate tax rates and a specific deduction.[115] Unlike corporations, however, political organizations are denied the surtax exemption, a deduction for net operating losses[116] and the dividends-received exclusion. Because of the sui generis nature of political campaign organizations,[117] the position adopted by Congress appears to have more theoretical justification than the ruling. In addition, the position of allowing a specific deduction while denying both a surtax exemption and the dividends-received exclusion is supported by both practicality[118] and sound tax theory.[119]

Although the congressional scheme of taxation is basically sound, serious and compelling questions can be raised concerning the very propriety of taxing political campaign organizations. Basically, these questions may be reduced to the issue of to what extent government should be excluded from intervention in the democratic elective process. Congress has adopted a view recognizing that a delicate balance exists between the needs to collect revenue and to encourage political activities.[120] The approach taken by Congress appears to be incorrect for two

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[110] I.R.C. § 527(c)(2). See notes 86 through 94 and accompanying text *supra*.

[111] Rev. Rul. 74-21, 1974-1 C.B. 14, 16.

[112] See note 90 and accompanying text *supra*.

[113] *See, e.g.*, I.R.C. § 265 (disallows a deduction for any expenditure related to tax-exempt income); *id.* § 512(a)(1) (defines "unrelated business taxable income").

[114] *See* Kaplan, *supra* note 13, at 350.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] See notes 70 & 86 and accompanying text *supra* (specific deduction) and note 97 and accompanying text *supra* (surtax exemption).

[119] Since political organizations were the ultimate recipients of these dividends and did not pass them through to their members, a formal conduit relationship was absent, thus making the exclusion inappropriate. *See* Kaplan, *supra* note 13, at 345.

[120] S. REP. NO. 1357, *supra* note 18, at 26, U.S. CODE CONG. & AD. NEWS at 7502.

reasons: (1) the collection of revenue is only minimally protected since political campaign organizations are insignificant sources of tax revenue,[121] and (2) the dangers inherent in governmental intervention in the elective process should clearly be a more dominant consideration than the marginal benefit to be obtained by taxing political campaign organizations.

In our democratic system of government, the value placed upon the integrity of the elective process should far exceed that placed upon collection of the revenues. Recent history, which has demonstrated that the IRS is capable of being politicized, justifies the conclusion that Congress should eliminate involvement by the IRS in the elective process by completely exempting political campaign organizations from taxation.[122] In so doing, Congress would be taking a significant step toward minimizing governmental influence in the democratic elective process.

II. The Political Candidate

A. *Personal Taxability of the Candidate*[123]

1. History

While political contributions in support of a particular candidate[124] are generally made to a campaign organization, contributions are often made directly to the candidate, especially in local campaigns.[125] In 1939, the IRS ruled that political contributions to individual candidates were "political gifts" that were not taxable income to the candidate.[126]

Several court cases decided before and after this ruling indicated that political contributions were taxable to the candidate when diverted to his personal use.[127] The IRS modified its position in 1954 to conform to the holdings of these cases; however, the Service reiterated the gen-

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[121] *Id.* at 36, U.S. Code Cong. & Ad. News at 7510; *see* Kaplan, *supra* note 13, at 350.

[122] Kaplan, *supra* note 13, at 350.

[123] For a comprehensive outline of this area of the law, see A.I.C.P.A. Compliance Manual, *supra* note 6, at 53-56.

[124] The term "candidate" is defined by I.R.C. § 41(c)(2) as a person who has announced publicly that he is a candidate for election or nomination to a particular federal, state or local elective public office, and who has met the legal qualifications necessary to hold that office. Rev. Proc. 68-19, 1968-1 C.B. 810 defines "candidate" as a person who has received contributions, regardless of whether he has announced his candidacy.

[125] *See* Streng, *supra* note 16, at 159.

[126] I.T. 3276, 1939-1 (Part 1) C.B. 108.

[127] *See, e.g.,* Reichert v. Commissioner, 19 T.C. 1027, 1038-39 (1953) (chairman of local political party used contributions for his own purposes), *aff'd on other grounds*, 214 F.2d 19 (7th Cir. 1954), *cert. denied,* 348 U.S. 909 (1955); Paschen v. United States, 70 F.2d 491, 500 (7th Cir. 1934) (records inadequate to allow tracing of comingled funds).

eral rule that political contributions were not taxable income to the candidate when used for campaign purposes.[128] In a later ruling the IRS clarified the "diversion" exception by providing that interest received on cash contributions and cash dividends and gains realized on the sale of contributed securities were includible in gross income when a political candidate controlled the contributed funds personally.[129] This ruling further stipulated that a political campaign fund controlled by the candidate separately from an independent political organization constituted a separate taxable entity.[130] Therefore, under this ruling all income was taxable to the entity rather than to the candidate personally.

In determining whether political contributions were being used for campaign purposes,[131] the IRS provided that contributions would be considered used for campaign purposes when expended for "generally recognized campaign expenses" irrespective of the period for which they were incurred.[132] Under this ruling, contributions used for legitimate campaign expenses also included contributions transferred to a local, state or national committee of the candidate's party, or to the candidate himself as reimbursement for his out-of-pocket expenses from either the current or a previous campaign.[133] Moreover, unexpended campaign surpluses could be returned to known contributors or transferred to the

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[128] Rev. Rul. 54-80, 1954-1 C.B. 11-12. This position, upheld in several later cases, *see e.g.*, United States v. Jett, 352 F.2d 179, 182 (6th Cir. 1965) (tax imposed on basis of *Paschen, Reichert* and Rev. Rul. 54-80), *cert. denied*, 383 U.S. 935 (1966); O'Dwyer v. Commissioner, 28 T.C. 698, 702-04 (1957) (same), *aff'd*, 266 F.2d 575, 584-86 (4th Cir.), *cert. denied*, 361 U.S. 862 (1959); Ridenour v. Commissioner, 16 T.C.M. (CCH) 538, 544-45 (1957)(tax imposed following *Reichert* precedent), was restated and consolidated in a subsequent ruling, Rev. Rul. 71-449, 1971-2 C.B. 77, which has also been approved and clarified by two more recent rulings, Rev. Rul. 74-22, 1974-1 C.B. 16; *see* Rev. Rul. 74-23, 1974-1 C.B. 17 (interest, dividends and net gains on sales of contributions are included in gross income).

[129] Rev. Rul. 74-23, 1974-1 C.B. 17, 18 (reported on U.S. Fiduciary Income Tax Return, Form 1041). Although not mentioned, other items of passive income such as rents and gains from the sale of other types of property should theoretically be included in gross income. *See* Streng, *supra* note 16, at 151.

[130] Rev. Rul. 74-23, 1974-1 C.B. 17, 18 (characterized as a trust).

[131] Since many of the previous cases holding political contributions taxable to the candidate involved factual situations in which the taxpayer-candidate had insufficient financial records with which to establish a defense, *see, e.g.*, Paschen v. United States, 70 F.2d 491, 500 (7th Cir. 1934), the IRS ruled that the political candidate should maintain detailed substantiating records to avoid inclusion of disbursements of the funds in the candidate's income. Rev. Proc. 68-19, 1968-1 C.B. 810, 811. In addition, a presumption that political funds have been converted to personal use arises if the funds are comingled with the candidate's personal funds in such a manner that identification is impossible or impractical. *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 52.

[132] Rev. Proc. 68-19, 1968-1 C.B. 810, 810-11.

[133] *Id.*

federal government without being characterized as diversions for the personal benefit of a candidate.[134]

The IRS has also ruled that, in addition to the diversion exception, political campaign contributions made in exchange for political favors result in income to the individual candidate. This exception has been enforced regardless of whether the payments were made directly to the candidate or indirectly to a political campaign organization.[135] The theory underlying this exception is that such a payment, rather than being a contribution, is actually a quid pro quo.[136]

2. Present Law

When Congress enacted section 527,[137] it did not specifically deal with the taxability of political contributions received directly by the candidate.[138] Rather, it merely indicated that the law then in effect with respect to diversions was to remain applicable.[139] Furthermore, the statute continued prior law by providing that a properly segregated political fund that met the requirements for a qualifying "political organization" was to be treated as a separate taxable entity.[140] Under the statute, contributions to a segregated fund are not included in the candidate's gross income although he receives them personally unless he diverts them to his personal use, fails to keep adequate substantiating records or, assuming the new statute also continues the political influence exception, accepts them in exchange for political favors.[141]

Congress recognized the problem caused by the disposition of unexpended campaign funds and specifically provided in section 527 for methods of disposing of surplus funds without causing a diversion to the

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[134] *Id.* at 811; Rev. Rul. 74-22, 1974-1 C.B. 16, 16 (refunds may be impractical); *see* Streng, *supra* note 16, at 161.

[135] Rev. Rul. 75-103, 1975-1 C.B. 17, 18. Payment made to a political campaign organization would, nevertheless, probably constitute "exempt function income" to the organization while simultaneously being characterized as gross income to the candidate. *See* Streng, *supra* note 16, at 161 n.119.

[136] Streng, *supra* note 16, at 160; *see* Rev. Rul. 75-103, 1975-1 C.B. 17, 18 (payment for services to be rendered); Reichert v. Commissioner, 19 T.C. 1027, 1038 (1953) (payments made in exchange for influence in obtaining political appointment), *aff'd on other grounds,* 214 F.2d 19 (7th Cir. 1954), *cert. denied,* 348 U.S. 909 (1955).

[137] Act of Jan. 3, 1975, Pub. L. No. 93-625, 88 Stat. 2108 (codified at I.R.C. § 527).

[138] *See* Streng, *supra* note 16, at 160.

[139] *Id; see* S. Rep. No. 1357, *supra* note 18, at 31, U.S. Code Cong. & Ad. News at 7507.

[140] I.R.C. § 527(e)(1)-(2). *See also* S. Rep. No. 1357, *supra* note 18, at 26, U.S. Code Cong. & Ad. News at 7502 (explanation of § 527). See notes 58 through 69 and accompanying text *supra.*

[141] See notes 144 & 145 and accompanying text *infra.*

candidate's personal use.[142] Section 527 permits disposition by a contribution to a qualified political organization, an exempt "public charity," or the general fund of the federal, state or local government.[143] The committee reports also provide that payments by a political organization to a candidate either to cover his transition expenses or to benefit him in connection with his campaign are not to be treated as diversions if reasonable in amount.[144] Furthermore, Congress indicated that in cases where the estate or survivors of a deceased candidate receive unexpended campaign funds, a reasonable period of time will be allowed, as provided by section 527(d), following the candidate's death for the disposition of such funds. Any funds left undisposed within a reasonable time, however, constitute income in respect of a decedent.[145] Since Congress indicated that prior law with respect to diversions remains applicable, the unexpended surplus would presumably also be returned pro rata to known contributors.[146] Congress did, however, display an intent to classify as a diversion for personal use any payment by a political organization to a third party in satisfaction of a candidate's legal obligation incurred without respect to the campaign.[147]

The incidental problem of dealing with newsletter funds established to publish and distribute newsletters or questionnaires to potential supporters has also been settled by section 527.[148] The income tax treatment of such funds was unclear prior to the enactment of section 527. The IRS had previously ruled that contributions received by an elected official for such a purpose were includible in his gross income.[149] This treatment was inconsistent with the assumption by the IRS that political contributions were nontaxable "gifts," and was apparently based upon the rationale that such activities were connected with the elected official's trade or business.[150] Section 527 provides that a newsletter fund of an elected public official, a candidate or a person elected

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[142] I.R.C. § 527(d); *see* S. REP. No. 1357, *supra* note 18, at 30-31, U.S. CODE CONG. & AD. NEWS at 7506-07.

[143] I.R.C. § 527(d)(1)-(3).

[144] S. REP. No. 1357, *supra* note 18, at 31, U.S. CODE CONG. & AD. NEWS at 7507 (voice or speech lessons not a diversion to personal use); *see* Streng, *supra* note 16, at 163 n.133 (moving expenses, costs of staff organization, issue research, etc.).

[145] S. REP. No. 1357, *supra* note 18, at 31, U.S. CODE CONG. & AD. NEWS at 7507.

[146] See notes 127 through 136 and accompanying text *supra.*

[147] S. REP. No. 1357, *supra* note 18, at 31, U.S. CODE CONG. & AD. NEWS at 7507 (funds used to pay candidate's income tax or to satisfy pledge of charitable contributions); *see* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 53.

[148] I.R.C. § 527(g).

[149] Rev. Rul. 73-356, 1973-2 C.B. 31, 32.

[150] *See* Streng, *supra* note 16, at 164. See note 126 and accompanying text *supra.*

to office who has not begun his term,[151] but not of a former elected official not presently a candidate,[152] is to be treated as an exempt political organization.[153] This provision is limited by the requirement that the fund must be segregated from personal accounts,[154] must not be used for campaign purposes,[155] and may be expended only for the publication of a newsletter.[156] Any expenditure beyond newsletter expense or any transfer of newsletter funds other than that allowed by section 527(d)[157] is to be treated as a diversion of funds and is includible in the recipient's taxable income.[158]

3. Analysis

Taxation of political campaign organizations conflicts with the basic democratic philosophy of substantial nonintervention by government in the political process.[159] In this respect, the tax treatment of an individual candidate's segregated political campaign funds as a political organization is arguably subject to the same criticisms. The positions taken by the IRS and Congress with respect to diversions of campaign funds and the receipt of campaign contributions in exchange for political influence are, however, based upon different considerations. Taxation of these two aspects of a political candidate's activities does not involve an attempt to regulate the financing of political campaigns but, rather, acts to eliminate a possible means of tax avoidance available to the individual candidate. Therefore, the diversion and political influence exceptions remain conceptually correct and do not violate the position of neutrality that government should maintain in connection with the financing of political campaigns.[160]

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[151] I.R.C. § 527(g)(1); *see* S. REP. No. 1357, *supra* note 18, at 34, U.S. CODE CONG. & AD. NEWS at 7510.

[152] S. REP. No. 1357, *supra* note 18, at 34 n.4, U.S. CODE CONG. & AD. NEWS at 7478, 7510 n.4.

[153] I.R.C. § 527(g).

[154] *See* S. REP. No. 1357, *supra* note 18, at 34, U.S. CODE CONG. & AD. NEWS at 7510.

[155] *See* A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 59. *See also* S. REP. No. 1357, *supra* note 18, at 34, U.S. CODE CONG. & AD. NEWS at 7510.

[156] *See* S. REP. No. 1357, *supra* note 18, at 34, U.S. CODE CONG. & AD. NEWS at 7510.

[157] Transfers cannot, however, be made to a political organization that is not a newsletter fund since funds must be utilized solely for newsletter, as opposed to campaign, expenses. *Id.*, U.S. CODE CONG. & AD. NEWS at 7510.

[158] *Id.*, U.S. CODE CONG. & AD. NEWS at 7510.

[159] See notes 120 through 122 and accompanying text *supra.*

[160] *See* Comment, *Tax Subsidies for Political Participation,* 31 TAX LAW. 461, 461 (1978).

B. Deductibility of Campaign Expenses by the Candidate

1. History

Since most political candidates are forced to expend personal funds in campaigning,[161] they naturally are interested in the deductibility of these expenditures for tax purposes. As a general rule, however, political campaign expenses are not deductible[162] regardless of the success of the campaign and regardless of whether the candidate is seeking office for the first time or is seeking re-election.[163] In the leading case of *McDonald v. Commissioner*[164] the Supreme Court apparently foreclosed completely any deduction by an individual candidate of personal political campaign expenses.[165] In *McDonald*, the Court held that campaign expenses were not deductible expenses of a "trade or business" since they were not incurred in the performance of business, *i.e.* official duties.[166] The Court further concluded that a defeated candidate's campaign expenses were not deductible as a loss incurred in a "transaction entered into for profit" since the purpose of the expenditures was to persuade the electorate rather than to purchase the election.[167] Similarly, the Court held that campaign expenses were not deductible as expenses incurred for the production of income.[168]

While based upon statutory construction, the decision in *McDonald* was reflective of legislative history,[169] Treasury regulations,[170] Treasury practice[171] and a prior Supreme Court decision.[172] The *McDonald* ruling has been consistently upheld by a series of subsequent judicial decisions,[173] a specific statute,[174] Treasury regulations[175] and Treasury rul-

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[161] *See* Mortenson & Winkelman, *Income Tax Consequences of Political Contributions*, 47 TAXES 133, 136 (1969).

[162] *Id.*

[163] J. CHOMMIE, FEDERAL INCOME TAXATION 112 (2d ed. 1973).

[164] 323 U.S. 57 (1944) (state judge appointed to an interim term unsuccessfully sought election to a full term).

[165] J. CHOMMIE, *supra* note 163, at 112.

[166] 323 U.S. at 60-61.

[167] *Id.* at 61 (construing I.R.C. § 165(a), (c)(2)).

[168] 323 U.S. at 61-63 (construing I.R.C. § 212(1)).

[169] 323 U.S. at 62 (citing H. REP. No. 2333, 77th Cong., 2d Sess. 75 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 88 (1942)).

[170] 323 U.S. at 62 n.5 (citing Treas. Reg. 103, §§ 19.23(a)-15, 23 (o)-1).

[171] 323 U.S. at 62 n.5 (citing O.D. 864, 4 C.B. 211 (1921)), *declared obsolete by* Rev. Rul. 69-31, 1969-1 C.B. 307.

[172] 323 U.S. at 62 n.5 (citing Reed v. Commissioner, 13 B.T.A. 513 (1928), *rev'd on other grounds*, 34 F.2d 263 (3d Cir. 1929), *rev'd sub nom.* Lucas v. Reed, 281 U.S. 699 (1930)).

[173] *See, e.g.*, Shoyer v. United States, 290 F.2d 817, 818 (3d Cir.) (re-election to judicial office), *cert. denied*, 368 U.S. 835 (1961); Maness v. United States, 237 F. Supp.

ings.[176] These subsequent rulings rejected several novel taxpayer's arguments, such as the classification of campaign expenditures as research and experimental expenditures,[177] as capital investments amortizable over the term of office,[178] or as business expenses related to an attorney-candidate's increased law practice.[179] The only exceptions to the otherwise consistent denial of deductions involved entrance, qualifying, and

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918, 920 (M.D. Fla. 1965) (re-election expenses nondeductible under § 212(1); however, filing fees paid to Secretary of State deductible as taxes paid under § 164(a)), *aff'd,* 367 F.2d 357 (5th Cir. 1966), *cert. denied,* 386 U.S. 932 (1967); Nichols v. United States, 201 F. Supp. 337, 340, 342 (N.D. Ga. 1962) (entrance fee paid to political committee for party primary nondeductible under § 162(a) or § 212(1)), *vacated on other grounds,* 223 F. Supp. 709 (N.D. Ga. 1963); Mays v. Bowers, 106 F. Supp. 337, 338 (E.D.S.C. 1952) (miscellaneous campaign expenses nondeductible under § 162(a), § 212(1), or § 165(c)(1)), *aff'd,* 201 F.2d 401 (4th Cir. 1953); Levy v. United States, 535 F.2d 47, 49-50 (Ct. Cl.) (qualification fee and miscellaneous campaign expenses nondeductible under § 162(a) or § 212(1)), *cert. denied,* 429 U.S. 885 (1976); Poitras v. Commissioner, 36 T.C.M. (CCH) 700, 701 (1977) (filing fee for circuit clerk nondeductible under § 162(a), § 212(1) or § 164); Hakim v. Commissioner, 33 T.C.M. (CCH) 223, 224 (1974) (city council campaign expenses nondeductible under § 162(a) or § 212(1)), *aff'd,* 512 F.2d 1379 (6th Cir. 1975); Nichols v. Commissioner, 60 T.C. 236, 239 (1973) (primary entrance fee nondeductible under § 162(a) or § 212(1)), *aff'd,* 511 F.2d 618 (5th Cir.), *cert. denied,* 423 U.S. 912 (1975); Maness v. Commissioner, 54 T.C. 1602, 1604, 1606 (1970) (state senatorial campaign expenses denied deduction as "public relations expenses" of law practice under § 162(a) or § 212(1)); Sholund v. Commissioner, 50 T.C. 503, 508 (1968) (county judgeship campaign expenses not deductible as expenses accrued in furtherance of law practice under § 162(a) or § 212(1)); Moreland v. Commissioner, 19 T.C.M. (CCH) 938, 941 (1960) (congressional campaign expenses nondeductible under § 162(a), § 165(c)(1), or § 212(1)); Rev. Rul. 60-366, 1960-2 C.B. 63 (filing fee imposed by state statute upon candidates not deductible under either § 162(a), § 212(1) or § 164); *cf.* Stratton v. Commissioner, 54 T.C. 255, 269, 282 (1970) (in a net worth computation disputed by IRS, automobile used for campaign purposes included at cost less depreciation, suggesting the campaign-related depreciation is deductible).

[174] I.R.C. § 162(e)(2)(A).

[175] Treas. Reg. §§ 1.212-1(f) (1975), 1.162-20(b)-(c)(1) (1969).

[176] See notes 177 & 188 and accompanying text *infra.*

[177] Hakim v. Commissioner, 33 T.C.M. (CCH) 223, 225 (1974) (nondeductible under § 174), *aff'd,* 512 F.2d 1379 (6th Cir. 1975).

[178] Maness v. United States, 367 F.2d 357, 358 (5th Cir. 1966), *cert. denied,* 386 U.S. 932 (1967); Levy v. United States, 535 F.2d 47, 50 (Ct. Cl.), *cert. denied,* 429 U.S. 885 (1976).

[179] *See, e.g.,* Arditto v. Commissioner, 30 T.C.M. (CCH) 866, 867-68 (1971) (state senatorial campaign expenses denied a § 162(a) deduction as lawyer's advertising); Maness v. Commissioner, 54 T.C. 1602, 1604, 1606 (1970) (campaign expenses not "ordinary and necessary" or reasonably related to law practice, so § 162(a) deduction disallowed); Sholund v. Commissioner, 50 T.C. 503, 508 (1968) (no § 162(a) deduction since campaign advertising not to further the candidate's law practice); Moreland v. Commissioner, 19 T.C.M. (CCH) 938, 941 (1960) (any increased legal business merely incidental to election campaign).

filing fees paid by candidates to governmental units.[180] In cases where the payment of fees was found to have been made for the purpose of raising revenue rather than to comply with regulations, both the IRS[181] and the courts[182] allowed a deduction—initially.[183] The IRS,[184] followed later by the courts,[185] subsequently reversed its position and denied the deductions.

Postelection campaign-related expenses received more favorable tax treatment. Deductions were allowed for the expenses of defending against a recall election[186] and for defending charges of misconduct.[187] Deductions were disallowed, however, for the expenses of defending a contested general[188] or primary election,[189] or for prosecuting a libel suit arising out of an election.[190]

Nevertheless, there were a few circumstances in which deductions for campaign-related expenses were allowed. Deductions were allowed for any expenditures of diverted funds otherwise deductible under

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[180] Fees paid to political committees of political parties, even if statutory, were not deductible. Rev. Rul. 57-345, 1957-2 C.B. 132. *But see* cases cited in note 184 *infra*.

[181] *See* Rev. Rul. 57-345, 1957-2 C.B. 132 (state imposed filing fee on candidates for elective office used to defray expenses of primary election and therefore deductible as a tax under § 164).

[182] *See, e.g.*, Campbell v. Davenport, 362 F.2d 624, 629 (5th Cir. 1966)(statutory filing fee paid to political party deductible as tax under § 164 since it was revenue to defray primary election expenses); Maness v. United States, 237 F. Supp. 918, 920 (M.D. Fla. 1965) (mandatory fee paid to state deductible even though state could transfer it to political party), *aff'd*, 367 F.2d 357 (5th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967); Nichols v. United States, 223 F. Supp. 709, 711 (N.D. Ga. 1963) (entrance fee paid to state political party deductible since used to defray election expenses).

[183] I.R.C. § 164. Prior to the Revenue Act of 1964, state taxes were generally deductible, but the 1964 amendments added the enumerations found in § 164(a)(1)-(5) and the § 164(a) "catchall" clause.

[184] Rev. Rul. 60-366, 1960-2 C.B. 63, (revoking Rev. Rul. 57-345, 1957-2 C.B. 132).

[185] *See* Nichols v. Commissioner, 60 T.C. 236, 238 (1973) (filing fee paid to state party for primary election nondeductible under the provisions of § 164(a)), *aff'd*, 511 F.2d 618 (5th Cir.), *cert. denied*, 423 U.S. 912 (1975).

[186] *See* Rev. Rul. 71-470, 1971-2 C.B. 121 (since taxpayer was an elected official defending his position instead of a candidate the expenses were deductible under § 162(a)).

[187] *See* Rev. Rul. 74-394, 1974-2 C.B. 40 (legal expenses deductible under § 162(a)).

[188] *See* Rev. Rul. 1, 1953-1 C.B. 36 (legal expenses nondeductible under § 162(a) or § 212(1) since related to original contest to obtain office and therefore not in discharge of duties of office).

[189] *See* Martino v. Commissioner, 62 T.C. 840, 845 (1974) (legal fees nondeductible under § 162(a) or § 212(1) since they were incurred in seeking office, not in defending position of an elected official).

[190] *See* Robert Edward Kleinschmidt, 12 T.C. 921 (1949) (newspapers published statements against a candidate).

applicable code provisions.[191] If a candidate was fortunate enough to have had excess contributions and to have then transferred the excess to avoid a taxable personal diversion, no chartiable deduction was, however, allowed.[192] Secondly, once the IRS had decided that passive investment income realized by the segregated campaign funds of political candidates should be taxed,[193] it also provided that expenses related to the production of passive income were deductible[194] and that all other applicable deductions and exclusions were also allowable.[195]

2. Present Law

In contrast with other areas of tax law relating to political campaigns, the effect of section 527[196] on the deductibility of campaign expenses by candidates has been minimal. Except for an historically significant IRS ruling,[197] the prior law disallowing deductions for campaign-related expenses remains applicable. The scope of section 527 does, however, touch on several minor expense items not directly related to the campaign itself. For example, Congress indicated that the law with respect to the deductibility of expenditures associated with taxable diversions to candidates[198] and related to the taxable income of a candidate's separate campaign fund was to remain substantially the same.[199] Additionally, since newsletter funds are generally to be treated as political organizations under section 527, only those expenses directly connected with the funds' taxable passive income are to be deductible.[200] Thus, publication expenses are not deductible.[201]

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[191] Rev. Proc. 68-19, 1968-1 C.B. 810; *see* I.R.C. § 162(a) (business expenses); *id.* § 170 (charitable contributions).

[192] Rev. Rul. 74-22, 1974-1 C.B. 16.

[193] See note 129 and accompanying text *supra.*

[194] Rev. Rul. 74-23, 1974-1 C.B. 17. Sales expenses related to the sale of contributed securities reduced the gain realized on the sale, while expenses directly attributable to the production of dividend and interest income were deductible along with a $100 specific deduction. *Id.*

[195] Rev. Rul. 74-475, 1974-2 C.B. 23.

[196] I.R.C. § 527.

[197] O.D. 864, 4 C.B. 211 (1921), *declared obsolete by* Rev. Rul. 69-31, 1969-1 C.B. 307.

[198] *See* S. REP. No. 1357, *supra* note 18, at 31, U.S. CODE CONG. & AD. NEWS at 7507. See notes 188 through 190 and accompanying text *supra.*

[199] I.R.C. § 527(c)(1)(B)-(2). Minor variations from prior law involve the denial of deductions for dividends received and net operating losses. *Id.*

[200] *Id.* To prevent proliferation of funds, however, the $100 specific deduction is disallowed. *Id.* § 527(g)(2)(B); *see* S. REP. No. 1357, *supra* note 18, at 34. U.S. CODE CONG. & Ad. News at 7510.

[201] *See* Streng, *supra* note 16, at 165. Publication expenses in excess of publication income apparently would be deductible by an elected official though not by a candidate

III. The Political Contributor

A. *Deductibility of Contributions*

1. Direct Contributions

a. Business Contributors

Since 1918, IRS regulations have denied business expense deductions for political campaign contributions and expenditures.[202] Prior to 1938, this regulation applied only to corporations, but its coverage was subsequently expanded to include all business taxpayers.[203] In 1962 this position was codified by the amending of section 162 to provide expressly for the denial of a business deduction for political contributions.[204] Even without this specific statutory denial, disbursements for political contributions generally are not sufficiently related to a particular business to be justifiably classified as "ordinary and necessary" business expenses[205] under the general statutory provision.[206] The IRS has additionally indicated that a business may not deduct a political contribution under the guise of a charitable contribution.[207]

b. Individual, Nonbusiness Contributors

Prior to 1971, personal political contributions were not deductible.[208] However, evidencing a recent trend of utilizing the tax laws for nonrevenue purposes, Congress enacted sections 41[209] and 218[210] of the

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under Rev. Rul. 73-356, 1973-2 C.B. 31. *See* A.I.C.P.A. Compliance Manual, *supra* note 6, at 60.

[202] Treas. Reg. § 1.162-20(c)(1) (1965) (denying deductions as business expenses for amounts spent "for political campaign purposes (including the support of or opposition to any candidate for public office)").

[203] *See id.*

[204] Act of Oct. 16, 1962, Pub. L. No. 87-834, 76 Stat. 960 (codified at I.R.C. § 162(e)(2)(A)). This statute has been reinforced by IRS audit techniques designed to determine whether political contributions purportedly made by individual taxpayers are in fact made by business taxpayers. *See, e.g.*, I.R.M. 4231 (Audit Technique Handbook for Internal Revenue Agents), Chapter 13(60), *cited in* Streng, *supra* note 16, at 166 n.149. These audits also serve the purpose of uncovering various violations of the federal campaign laws. See notes 3 through 7 and accompanying text *supra*. The federal election campaign laws prohibit corporations from making contributions to candidates for federal offices. 2 U.S.C. § 441(b) (1976). In the absence of state law to the contrary, however, corporations may make contributions to candidates for state or local public offices.

[205] *See* J. Chommie, *supra* note 163, at 92.

[206] I.R.C. § 162(a).

[207] *See* Mortenson & Winkelman, *supra* note 161, at 134.

[208] *See* I.T. 3276, 1939-1 C.B. 108; Rev. Rul. 71-449, 1971-2 C.B. 77, 78.

[209] Act of Dec. 10, 1971, Pub. L. No. 92-178, 85 Stat. 497 (codified at I.R.C. § 41).

[210] Act of Dec. 10, 1971, Pub. L. No. 92-178, 85 Stat. 497 (codified at I.R.C. § 218), *repealed by* Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2778.

Internal Revenue Code in 1971.[211] By providing for limited tax subsidies in the form of credits or deductions, both sections were designed to reduce candidates' dependence on large contributors[212] by encouraging contributions from individual, nonbusiness taxpayers.[213] Although in the Revenue Act of 1978 Congress repealed section 218,[214] it left section 41[215] intact. If elected, the credit allowed under section 41 is limited initially to one-half of all political and newsletter fund contributions made by the taxpayer during the taxable year.[216] It is further limited to a maximum credit of $50 on joint returns and $25 on other returns,[217] neither of which may exceed the total tax liability net of certain other specified credits.[218]

For a contribution to qualify under section 41, it must be made to: (1) a candidate for election or nomination to a federal, state or local[219] elective public office,[220] (2) an incorporated or unincorporated association, committee or organization formed and operated exclusively to in-

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[211] *See* J. CHOMMIE, *supra* note 163, at 93. Pending adoption of the regulations under these code sections, the IRS released question-and-answer guidelines relating to the credit and deduction for political contributions. *See* [1978] 2 STAND. FED. TAX REP. (CCH) ¶ 2058.10.

[212] Comment, *supra* note 160, at 481.

[213] *See* I.R.C. § 41(a); *id.* § 218(a), *repealed by* Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2778. Estates or trusts could not utilize either the credit or the deduction. I.R.C. § 642(a)(2) & (i).

[214] Pub. L. No. 95-600, § 113(a)(1), 92 Stat. 2763 (1978). Section 218(a) of the Internal Revenue Code allowed an individual a deduction of $200 on joint returns and $100 on other returns for any political contribution as defined in § 41(c)(1) or newsletter fund contribution as defined in § 41(c)(5). However, under § 218(c), the election to take the deduction to determine maximum tax savings precluded the taxpayer's taking the credit allowed for political contributions under § 41.

To realize his maximum tax savings, each taxpayer making a political contribution before the effective date of § 218's repeal, December 31, 1978, had to examine his own particular tax situation. Generally, a higher bracket taxpayer preferred the deduction while the lower and middle bracket taxpayers preferred the credit since in most cases the latter group elected the standard deduction. For a convenient table setting forth determinations of whether the credit or deduction should have been utilized see [1978] 2 FED. TAXES (P-H) ¶ 5914. *See generally* [1977] 4 FED. TAX COORD. (RIA) ¶ A-4305.

[215] I.R.C. § 41.

[216] *Id.* § 41(a).

[217] *Id.* § 41(b)(1). The provision for these amounts, which represent increases from the amounts originally provided for in 1971 ($25 on joint returns and $12.50 on other returns), was enacted in 1975. *See* Streng, *supra* note 16, at 169 & n.170.

[218] I.R.C. § 41(b)(2). There is no carryover for the unused portion of a credit; it is lost forever. See [1977] 4 FED. TAX. COORD. (RIA) ¶ A-4302.

[219] The term "state" also includes the District of Columbia, while "local" refers to a political subdivision of a state. I.R.C. § 41(c)(4).

[220] *Id.* § 41(c)(1)(A). The election may be either a primary, general or special election. *Id.*

fluence the nomination or election of such a candidate,[221] (3) a national, state or local committee,[222] (4) a national political party,[223] or (5) a newsletter fund.[224] Since the class of qualifying recipients is so broadly defined, it includes third or "minor" parties, organizations within a party that endorse candidates of other parties, and various ad hoc organizations that support particular major or minor party candidates or independents.[225] The credit remains available regardless of whether the contribution is made directly to the candidate or to a supporting organization[226] so long as the candidate meets the legal qualifications for office and announces his candidacy during the calendar year following the calendar year in which the taxpayer made the contribution and for which the credit is claimed.[227] Furthermore, the contribution must be used to further the candidacy of a candidate.[228] The expending of funds in connection with a political gathering[229] or for the general administrative costs of the campaign organization[230] meets this test for tax advantages. However, another important restriction on the availability of the credit is that only contributions of money qualify.[231] Therefore, the sec-

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[221] *Id.* § 41(c)(1)(B). The committee may support several candidates, so long as the contribution is to be used to further their candidacies. *Id.*

[222] *Id.* § 41(c)(1)(C)-(E). A further requirement for such committees is that each successively lower committee must have been designated a committee of the national political party by its immediately preceding parent committee. *Id.*

[223] *Id.* § 41(c)(3). In a presidential election year, a national political party is one officially fielding presidential and vice-presidential candidates or electors in ten or more states. In nonpresidential election years, a national political party is one satisfying these qualifications in the immediately preceding presidential election. *Id.*

[224] *Id.* § 41(c)(5).

[225] *See* [1975] 4 FED. TAX COORD. (RIA) ¶A-4308.

[226] S. REP. NO. 1357, *supra* note 18, at 35, U.S. CODE CONG. & AD. NEWS at 7511.

[227] I.R.C. § 41(c)(1)(A)-(B), (2). Initially, the credit was available only if the political candidate for whose benefit the contribution was made had publicly announced his candidacy before the end of the year in which the contribution was made and for which the credit was sought. Streng, *supra* note 16, at 169-70. Congress realized, however, that for various reasons a potential candidate might not wish to announce his candidacy early. For example, his decision to seek elective office may depend upon receipt of sufficient contributions with which to finance a campaign—an effort that would be hampered if the contributions were not eligible for the credit. *See* S. REP. NO. 1357, *supra* note 18 at 35, U.S. CODE CONG. & AD. NEWS at 7511. Furthermore, the provisions remain applicable to contributions made following the close of a campaign that are intended to be used to reduce a deficit incurred in the campaign. A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 63.

[228] I.R.C. § 41(c)(2)(A)-(B).

[229] [1975] 4 FED. TAX COORD. (RIA) ¶ A-4308. These expenses include such items as advertising, rental of a gathering place, food and refreshments, etc. *Id.*

[230] *Id.* This category ordinarily includes such items as research and polling expenses. *Id.*

[231] I.R.C. § 41(c)(1).

tion does not cover contributions of services or property or contributions in exchange for political favors.[232] In addition, a contribution qualifies only if it is actually disbursed by the taxpayer during the year for which the credit is sought.[233] Finally, the credit will be disallowed unless verified by the contributor.[234] A cancelled check will generally be accepted as proof of the contribution,[235] but, to cover those situations where the contribution is in cash or where further proof of payment is desired, receipts modeled after samples released by the IRS should be given to the contributor by the recipient.[236] If the validity of the credit is questioned by the IRS the receipt will be accepted without need for further verification by the taxpayer.[237]

2. Indirect Contributions[238]

a. Business Contributors

The tax treatment of indirect political contributions made by businesses has evolved primarily under section 162(a), which generally provides a deduction for "ordinary and necessary" business expenses;[239] however, section 166, which permits a deduction for bad debts,[240] has also played a prominent role. Faced with the possibility that disguised contributions would be deducted under these sections, both Congress and the IRS were forced to take measures to prevent the deduction, under an otherwise permissible category of deductible expenses, of indirect political contributions.

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[232] Rev. Rul. 75-103, 1975-1 C.B. 17, 18.

[233] I.R.C. § 41(a). Therefore, accrual method taxpayers cannot take a credit for a pledged contribution until it is actually paid. *See* [1975] 4 FED. TAX COORD. (RIA) ¶ A-4306.

[234] I.R.C. § 41(b)(3); Habeeb v. Commissioner, 35 T.C.M. (CCH) 1134, 1136 (1976) (deduction denied taxpayer because of lack of verification—no receipts or records and could not recall names of candidates and dates and amounts of contributions).

Prior to 1976, the IRS also required that the individual candidate or campaign committee receiving contributions verify that the contributions were used for restricted purposes before the contributor could qualify for the deduction or credit. Presently, however, verification by the contributor is the only requirement. [1978] 4 FED. TAX COORD. (RIA) Developments ¶ A-4308.2.

[235] [1975] 4 FED. TAX COORD. (RIA) ¶ A-4307.

[236] For sample copies, see [1978] 2 STAND. FED. TAX REP. (CCH) ¶ 2058.10; A.I.C.P.A. COMPLIANCE MANUAL, *supra* note 6, at 68-69.

[237] *See* [1975] 4 FED. TAX COORD. (RIA) ¶ A-4307.

[238] The term "indirect contributions" is used to refer to any amounts of money not simply transferred to the political candidate or organization as an outright contribution, *i.e.* disguised contributions.

[239] I.R.C. § 162(a).

[240] *Id.* § 166.

1. Advertising

Prior to 1966, amounts expended for advertising in political convention programs were deductible under section 162(a) if the amount paid was not in excess of the value of the advertising space, was otherwise reasonable in amount and was directly related to the advertiser's business.[241] To the extent that these requirements were not met, the expenditure became a nondeductible political contribution.[242] Predictably, businesses began to abuse the deduction by paying exorbitant advertising rates for space in political programs and then claiming the expenditures as business expense deductions.[243] Congress accordingly enacted section 276[244] in 1966, which banned business expense deductions for advertisements in any political convention program.[245] This ban was subsequently relaxed in 1968 by the addition of section 276(c), which provided that section 276(a)(1) did not apply to amounts expended for advertisements in a political party's program for its presidential nominating convention.[246] To be deductible under section 276(c), the advertising proceeds could be used only for the purpose of defraying the costs of the convention,[247] had to be reasonable in amount[248] and had to satisfy the

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[241] Rev. Rul. 56-343, 1956-2 C.B. 115. Case law indicated that the advertising cost could be deducted if it publicized and created goodwill for the advertiser even though it did not "extol the virtues" of the advertiser's products. Denise Coal Co., 29 T.C. 528, 552-54 (1957) (praised the political party while mentioning the advertiser's name but not its business and products).

[242] Rev. Rul. 56-343, 1956-2 C.B. 115.

[243] J. CHOMMIE, *supra* note 163, at 92-93.

[244] Act of Mar. 15, 1966, Pub. L. No. 89-368, 80 Stat. 38 (codified at I.R.C. § 276).

[245] I.R.C. § 276(a)(1).

[246] Act of Mar. 15, 1968, Pub. L. No. 90-364, 82 Stat. 251 (codified at I.R.C. § 276(c)), *repealed by* Act of Oct. 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1296, *cited in* [1978] 3 FED. TAXES (P-H) ¶ 16,972 n.1.

[247] I.R.C. § 276(c). Any surplus of advertising receipts over convention expenses had to be reserved for the subsequent convention and no part of the advertising proceeds could be used to defray campaign expenses. *Id.*

[248] *Id.* The reasonableness requirement, which was designed to disallow a deduction for any amount that was actually a political contribution, [1975] 16 FED. TAX COORD. (RIA) ¶ L-2307.1, was composed of alternative tests, neither of which would permit a deduction if the cost of the advertisement was more than the cost of a comparable advertisement in a comparable program of a comparable nonpolitical convention. Treas. Reg. § 1.276-1(b)(2)(i) (1969). The first test of reasonableness was whether the advertising cost was "reasonable in light of the business the taxpayer may expect to receive . . . directly as a result of such advertising." I.R.C. § 276(c)(1). The purpose of this test was to permit a deduction for advertising intended to promote particular goods or services to those persons attending the convention. [1977] 16 FED. TAX COORD. (RIA) ¶ L-2307.1. The second test of reasonableness was whether the advertising cost was "reasonable in light of the business the taxpayer may expect to receive . . . as a result of the convention being

requirements of section 162.[249] Furthermore, the IRS ruled that there was no conflict between section 276(c) and those provisions of federal law making certain political contributions by corporations illegal.[250] No deduction was permitted, however, for advertising in any publication other than a presidential nominating convention program if any part of the amount inured to the benefit of a political candidate or party.[251] Nevertheless, Congress repealed section 276(c) for taxable years beginning after 1974[252] so that present law bars a business expense deduction for advertising in either a convention program of a political party or any other publication if any part of the proceeds inures to the benefit of a political candidate or party.[253] Finally, no business expense deduction is allowed under section 162(a) if the taxpayer cannot establish a sufficient relationship between the claimed advertising and his business.[254]

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held in an area in which the taxpayer has a principal place of business." I.R.C. § 276(c)(2). This test was designed to permit a deduction for a taxpayer doing business in the area of the convention if he could reasonably expect to realize increased profits due to the convention's being held in the area. [1977] 16 FED. TAX COORD. (RIA) ¶ L-2307.1. Therefore, institutional advertising of the type allowed in *Denise Coal Co.*, see note 241 and accompanying text *supra*, was deductible only under the second test of reasonableness. Treas. Reg. § 1.276-1(b)(2)(i) (1969).

[249] Treas. Reg. § 1.276-1(b)(2)(ii) (1969).

[250] Rev. Rul. 76-29, 1976-1 C.B. 85, 86 (the illegality provisions of federal law are designed to prevent corporations from influencing public elections, while the § 276(c) deduction by definition deals with business related expenditures rather than political contributions).

[251] I.R.C. § 276(a)(1).

[252] Act of Oct. 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263. The rationale for repeal was that § 276(c) was no longer necessary since the Presidential Election Campaign Fund law, which is financed by the dollar check-off on individual tax returns, authorized the expenditure of funds to defray expenses of presidential nominating conventions. [1978] 3 FED. TAXES (P-H) ¶ 16,972.5.

[253] I.R.C. § 276(a)(1). For examples see Treas. Reg. § 1.276-1(f)(3)(iv), examples (1), (4) (1968). "Political party" is defined in I.R.C. § 276(b)(1) and Treas. Reg. § 1.276-1(b)(1) (1969); "publication" is defined broadly in Treas. Reg. § 1.276-1(c) (1968) (includes all written advertising as well as radio and television announcements); "inures to the benefit of" is defined in I.R.C. § 276(b)(2) and Treas. Reg. § 1.276-1(f)(3) (1968) (used to further candidacy or received not "in the ordinary course of a trade or business"); "political candidate" is defined in Treas. Reg. § 1.276-1(f)(2). It should be noted that with respect to contributions to convention programs, the publisher of the program or the recipient of the advertising proceeds is immaterial; the "contribution" is never deductible. Treas. Reg. § 1.276-1(b)(1) (1968).

[254] Lancaster Stone Products Corp., 38 T.C.M. (P-H) ¶ 69,119 (1969) (advertising expense deduction denied for tickets to political dinners and related events distributed to customers) (alternative holding—the expenditures were of such a political nature as to be barred by § 162(e)(2)(A)).

2. Political Gatherings

Prior to the enactment of section 276 in 1966, the IRS had taken the position that the cost of tickets to a political dinner was not deductible as a business expense under section 162(a) since the expense was not incurred in an effort to obtain customers, but rather was expended to support the political aspects of the gathering.[255] Section 276 continues this position by disallowing a deduction for an amount[256] expended for admission to a dinner or program[257] if any part of the proceeds inures to a political party, candidate,[258] or to an inaugural ball, gala, parade, concert or similar event[259] identified with a political candidate or party.[260]

3. Political Convention Recruitment

Several early private rulings by the IRS allowed local business taxpayers a section 162(a) business expense deduction for contributions made to committees organized to bring political conventions to the locality in which the taxpayer had a trade or business.[261] The availability of this deduction was temporarily in doubt until the regulations clarified two statutory enactments. First, section 162 was amended in 1962 to prohibit specifically a business expense deduction for amounts paid for participation in political campaigns;[262] however, subsequent regulations indicated that a deduction for amounts paid to convention recruiting committees would nevertheless remain deductible.[263] Also, a regulation

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[255] IRS Letter Ruling, 9/22/50, *cited and discussed in* [1975] 16 FED. TAX COORD. (RIA) ¶ L-3610.

[256] Treas. Reg. § 1.276-1(f)(4) (1968).

[257] *Id.* § 1.276-1(d) (expansive definition that would apparently include all politically related gatherings).

[258] I.R.C. § 276(a)(2). For examples, see Treas. Reg. § 1.276-1(f)(3)(iv), examples (2)-(3) (1968).

[259] *See* Treas. Reg. § 1.276-1(e) (1968) (includes all gatherings associated with an inauguration).

[260] I.R.C. § 276(a)(3).

[261] IRS Letter Rulings, 4/25/51, 4/19/50, *cited in* [1975] 16 FED. TAX COORD. (RIA) ¶ L-3610 nn.51-52; *cf.* IRS Letter Ruling, 7/6/51, *cited in* [1975] 16 FED. TAX COORD. (RIA) ¶ L-3610 n.53 (permitting deduction for contributions by local businessmen directly to the political organization to cover convention expenses). *But cf.* Rev. Rul. 55-265, 1955-1 C.B. 22, 22 (deduction permitted only if the expected financial return from the convention is commensurate with the contributed amount).

[262] Act of Oct. 16, 1962, Pub. L. No. 87-834, §§ 3(a), 4(b), 76 Stat. 973.

[263] *See* Treas. Reg. § 1.162-15(b) (1958) (contributions to organizations other than those described in § 170 may be deducted as business expenses if directly related to taxpayers' business, expectation of financial return is reasonably commensurate with the amount donated, and not for political campaign purposes), *cited in id.* § 1.276-1(b)(1)(i).

issued subsequent to the enactment of section 276 indicated that this new statute was not intended to alter the previous rulings allowing the deduction.[264] Therefore, so long as the payments are not made to the political party itself, the rulings that allowed the deduction previously will apparently still apply.[265]

4. Loans

Early case law[266] and a number of IRS[267] rulings indicated that business taxpayers might be entitled to a bad debt deduction under section 166 for loans made to political parties.[268] However, section 271[269] presently bars a deduction by any taxpayer, other than a bank,[270] for bad debts on loans made to political parties[271] and for worthless securities, both of which would otherwise be deductible.[272] The obvious basis for this position is that such items might actually represent disguised political contributions.

No exceptions to the prohibition are recognized by the IRS, and it is irrelevant that the taxpayer has employed diligent but futile efforts to collect the debt.[273] As originally enacted, section 271 even prohibited a deduction for a bad debt arising out of a sale of goods or services to political parties.[274] The section was amended for taxable years beginning after 1975 to permit a deduction for a bad debt incurred by an accrual method taxpayer and arising out of "a bona fide sale of goods and services in the ordinary course of the taxpayer's trade or business" if the debt was accrued as a receivable.[275] That amendment further required

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[264] *Id.* § 1.276-1(b)(1)(i).

[265] [1975] 16 FED. TAX COORD. 2d (RIA) ¶ L-3610 (citing Rev. Rul. 55-265, 1955-1 C.B. 22).

[266] J. S. Cullinan, 19 B.T.A. 930, 932-33 (1930) (advance to political campaign that was to be repaid; collection efforts made; not legally liable, however, therefore no valid debt established and no deduction allowed).

[267] *See* J. CHOMMIE, *supra* note 163, at 92.

[268] I.R.C. § 166.

[269] Act of Aug. 16, 1954, ch. 736, 68A Stat. 82 (codified at I.R.C. § 271).

[270] Act of June 25, 1948, ch. 645, 62 Stat. 723 (codified at 18 U.S.C. § 610 (1976)), *repealed by* Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 475, 496.

[271] I.R.C. § 271(a).

[272] *See id.* §§ 165(g), 166.

[273] Rev. Rul. 57-189, 1957-1 C.B. 113, 113 (income for services rendered to political organization accrued in 1951; received payments for a time; remainder became uncollectible after enactment of § 271 in 1952; no deduction allowed), *declared osbolete by* Rev. Rul. 72-621, 1972-2 C.B. 651, 652.

[274] Treas. Reg. § 1.271-1(a) (1969) (presently not amended); Klein v. United States, 19 A.F.T.R.2d 1017 (W.D. Ky. 1967) (summary judgment denying a deduction based on § 271 for advertising services performed by a firm under contract).

[275] Tax Reform Act of 1976, Pub. L. No. 94-455, Title XXI, § 2104(a), 90 Stat. 1901.

that the taxpayer must have made substantial and continuing efforts to collect the debt, and that for the taxable year of accrual, more than thirty per cent of the taxpayer's accrued receivables must have been receivable from political parties.[276] Since section 271 explicitly applies only to political parties,[277] it does not preclude a deduction for uncollectible debts arising out of worthless loans made directly to political candidates[278] and deductions for such bad debts are presumably still governed by the prior law developed under section 166.[279]

b. *Individual, Nonbusiness Contributors*

Since an individual's political contributions were not deductible prior to 1971,[280] the law concerning deduction of indirect individual political contributions has only recently been fashioned and remains largely inconclusive. The existing law on the subject is founded upon the recently enacted statutes granting a limited personal deduction or credit for political contributions.[281] Whether indirect contributions qualify for the deduction or credit has been ruled upon only twice.

First, the IRS has ruled that an expenditure for raffle tickets sold to raise political campaign funds does not qualify for either the deduction or the credit.[282] The basis for this ruling was that an amount paid for a "chance" to win an item should not qualify as a contribution[283] since a raffle ticket merely represents the price paid for something of value.[284] This determination is consistent with the IRS position that raffle tickets do not qualify for a charitable contribution deduction.[285]

In the second situation the IRS was called upon to clarify its posi-

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[276] I.R.C. § 271(c). The efforts to collect the debt must have been made in good faith over a period of time and must be documented, although the filing of a lawsuit against the debtor-political party is not required. S. REP. No. 93-938, 94th Cong., 2d Sess. 402 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3831. The 30% requirement limits the applicability of the exception to taxpayers whose sale of goods and services to political parties constitutes a substantial part of their business, for example, advertising agencies, the media, and polling and organizational services. For this purpose, consideration is to be given to all of the taxpayer's trades and businesses. *Id.*, U.S. CODE CONG. & AD. NEWS at 3831.

[277] I.R.C. § 271(a).

[278] [1978] 18 FED. TAX COORD. (RIA) ¶ M-1114.

[279] See notes 266 through 268 and accompanying text *supra.*

[280] See note 208 and accompanying text *supra.*

[281] I.R.C. §§ 41, 218. Section 218 has been repealed. See note 214 *supra.*

[282] Rev. Rul. 72-411, 1972-2 C.B. 5, 5.

[283] *Id.* A political gift must not confer a private benefit on the contributor. Rev. Rul. 72-412, 1972-2 C.B. 5, 6.

[284] *See* Feinschreiber and Granwell, *Political Contributions: Income and Gift Tax Effects,* 26 TAX LAW. 285, 285 (1973).

[285] *See generally id.* at 286-88.

tion in regard to the availability of a credit or deduction for the entire amount of a ticket to a political fund-raising function. In an earlier announcement the IRS had allowed a credit or deduction if the function was "clearly in the context of a campaign of an announced candidate," and was "not primarily a device to confer private benefits in the form of meals or entertainment to the contributor."[286] The IRS later affirmed this position by ruling that the cost of tickets to a political function, such as a dinner, qualified in full as a contribution only if, in addition to the previous requirements, the meal or other private benefit conferred upon the contributor was incidentally related to the "essentially political nature of the event."[287] The IRS did indicate in the ruling that a political fund-raising purpose alone would not be sufficient; rather, the program must consist primarily of political discussions or speeches.[288] If these requirements were not met, only the excess of the ticket cost over a good faith reasonable estimate of the fair market value of the private benefits conferred was deductible.[289] Furthermore, the ruling required that the sponsor of the function determine the amount of the political contribution[290] and indicate it on both the tickets and promotional materials used. To this extent the IRS impliedly requires the sponsor to calculate and print the fair market value of the benefits conferred.[291] If the ticket purchaser failed to use his ticket, the amount of his political contribution could be no greater than that of someone who did use his ticket.[292] Therefore, if the contributor desires a political contribution equal to the cost of the ticket but does not intend to use it, he should make an outright contribution equal to that amount and not accept the ticket.[293]

For historical purposes, it should be observed that section 276,[294] which denies a deduction for certain specified indirect political contributions, and section 271,[295] which denies a bad debt deduction for loans to political parties, had no effect upon qualification of expenditures for the section 218 deduction. Although congressional intent was not clear concerning whether the section 218 individual itemized deduction was barred where the political contribution was prohibited as a business

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[286] T.I.R. No. 1145, 2/23/72, Question 9, *reprinted in* [1978] 2 STAND. FED. TAX REP. (CCH) ¶ 2058.10.

[287] Rev. Rul. 72-412, 1972-2 C.B. 5, 5.

[288] *Id.*

[289] *Id.*

[290] *I.e.*, price less market value of benefits conferred. *Id.* at 6.

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] I.R.C. § 276.

[295] *Id.* § 271.

expense deduction under section 276, the IRS apparently adopted the position that it was not.[296] Furthermore, a bad debt deduction for loans made to political parties and candidates by individual taxpayers apparently remains governed by section 166(d).[297]

3. Impartial, Quasi-Political Contributions

Several types of impartial political expenditures are deductible business expenses under section 162(a)[298] as forms of institutional or goodwill advertising.[299] For example, expenses incurred in advertising that encourages the public to register and vote, make political contributions or work in political campaigns, or which provides a political debating forum are deductible if the advertising is politically impartial and reasonably related to expectations of future patronage by the public.[300] In addition, impartial political expenditures that are reasonably expected to improve the morale of employees are deductible under section 162(a) since they will ultimately improve the business of the taxpayer. For example, the costs of encouraging employees to register and vote and to work for candidates and parties of their choice fall within this category.[301] Also included is the cost of establishing and operating a voluntary payroll deduction plan for employees desiring to make political contributions.[302] The costs of such programs are deductible if the costs are otherwise deductible under section 162(a) and the programs are politically impartial and reasonably related to an anticipated improvement in employee morale.[303]

In this context, the impartiality required is not the assurance of strict equality, but rather genuine attempts to ensure circumstances which are as nearly impartial as possible.[304] For instance, impartiality could not be maintained if a communication were made to a particular audience whose response would predictably benefit a particular political candidate or organization.[305]

This position appears conceptually sound from a tax policy stand-

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[296] Prop. Treas. Reg. § 1.218-1(a) (1972), *reproduced in* [1978] 3 FED. TAXES (P-H) ¶ 16,497.8.

[297] I.R.C. § 166(d).

[298] *Id.* § 162(a).

[299] *See* Rev. Rul. 62-156, 1962-2 C.B. 45, 47.

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.* at 49.

[305] *Id.*

point since the basic premises of the prohibition on deductibility of political contributions as business expenses are not violated.[306]

B. *Realization and Recognition of Income From Contributions*

1. History

Taxpayers have traditionally used property rather than cash as a source of political contributions in an attempt to minimize the tax impact of the contribution.[307] This situation was created primarily by the tax treatment historically applied to political contributions of appreciated property. First, political contributions of appreciated property prior to 1974 were treated as gifts that did not result in a realization of income by the contributor,[308] and the donee political candidate took a carryover basis in the property equal to its basis in the hands of the owner-contributor.[309] Secondly, although the donor-contributor was subject to the gift tax provisions,[310] the recipients of contributions were exempt from the operation of the income tax laws.[311] The result was that neither the contributor nor the recipient was taxed on the property's appreciation.[312] For example, if a taxpayer owned appreciated property with a fair market value of $60,000, but with a basis of only $30,000, he could make a $60,000 political contribution and avoid both a cash expenditure of $60,000 and a capital gains tax on the $30,000 of appreciation. Since the recipient of the contribution was exempt from the income tax laws, the $30,000 of appreciation went untaxed.

Following newspaper disclosures in 1972[313] that the major political parties were actively soliciting such property contributions, primarily securities, and that the appreciation on these contributions was going completely untaxed, the IRS took appropriate action. It ruled that political candidates and organizations were required to file income tax returns and pay income tax on gains received from the sale of contributed

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[306] See notes 202 through 207 and accompanying text *supra.*

[307] *See* Streng, *supra* note 16, at 166.

[308] Rev. Rul. 59-57, 1959-1 C.B. 626, 626. See notes 339 through 355 and accompanying text *infra.*

[309] Comment, *supra* note 9, at 332.

[310] See notes 339 through 355 and accompanying text *infra.*

[311] See notes 13 through 18 and accompanying text *supra.*

[312] *See* Comment, *supra* note 9, at 331.

[313] *See, e.g.,* Ladauer, *How Political Donors Avoid Gift, Gain Taxes by Contributing Stock,* Wall St. J., Sept. 27, 1972, at 1, col. 6. *See generally* Comment, *supra* note 9, at 331 & n.50 (discusses practice of contributing appreciated property and contains a copy of a form letter used in solicitation).

appreciated securities.[314] Under this position, the recipient recognized taxable income upon a later disposition of the property while the contributor realized no income. This position was based on the prior position taken by the IRS that neither the transfer nor the receipt constituted a taxable event.[315]

2. Present Law

Because of the criticism and controversy surrounding the position taken by the IRS, Congress enacted section 84 in early 1975.[316] Rejecting the argument that the initial transfer of appreciated property as a political contribution is not a taxable event, Congress decided that the property transfer to a political organization should be deemed to be a sale, with the income tax being imposed on the contributor at the time of the contribution. The contributor is treated as having realized an amount equal to the fair market value of the contributed property[317] so that the gain recognized and taxed is equal to the excess of this fair market value "sale price" over the taxpayer's adjusted basis in the property.[318] Congress also expanded the statute's coverage to include all contributed property[319] rather than simply contributed securities. Unlike the prior IRS ruling, the statute applies only to appreciated property[320] and does not permit a taxpayer to recognize a loss selectively by use of a political contribution of depreciated property.[321] Therefore, the astute contributor should sell depreciated property, generating cash that can be used to make a contribution and that also results in recognizable loss for tax purposes.[322] Furthermore, since the recipient political organization has a basis in the contributed property equal to that of the transferor plus

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[314] Rev. Rul. 74-21, 1974-2 C.B. 14, 15-16 (effective for sales made by political organizations after Oct. 3, 1972); Rev. Rul. 74-23, 1974-2 C.B. 17, 17-18 (effective for sales made by political candidates after Oct. 3, 1972). For a narrative of the interesting series of events occuring between the publication of the disclosures and the subsequent rulings by the IRS, see Comment, *supra* note 9, at 332-34.

[315] *See* Streng, *supra* note 16, at 167.

[316] Act of Jan. 3, 1975, Pub. L. No. 93-625, 88 Stat. 2108 (codified at I.R.C. § 84). Also entering into the decision was the determination to exempt political contributions from the gift tax. S. REP. No. 1357, *supra* note 18, at 32, U.S. CODE CONG. & AD. NEWS at 7508.

[317] I.R.C. § 84(c) (defined as in §§ 527(e)(1) and § 84(a)).

[318] *See id.* §§ 1001(a), (c), 1011(a), 1012.

[319] *Id.* § 84(a)(1).

[320] *Id.* § 84(a)(2) (fair market value in excess of basis).

[321] *See* S. REP. No. 1357, *supra* note 18, at 33, U.S. CODE CONG. & AD. NEWS at 7509. The recipient of the contributed depreciated property apparently takes a carryover basis in the property equal to the basis in the hands of the contributor, Streng, *supra* note 16, at 169, allowing the recipient to sell the property and take a loss.

[322] Streng, *supra* note 16, at 168.

the amount of any "gain" recognized by the transferor,[323] the political organization will be taxed only on the post-contribution appreciation upon a later disposition of the property.[324] Finally, the character of the gain realized from the "sale", *i.e.* ordinary income versus short-term or long-term capital gain, is determined under other applicable provisions, and since the transfer is deemed to be a sale, the depreciation recapture provisions are also applicable.[325]

3. Analysis

The enactment of section 84 is based upon sound tax policy for two reasons. First, it equitably requires both the contributor and the recipient to recognize only that portion of the appreciation occuring while each party owns the property. Secondly, taxing the contributor at the time of the contribution has the effect of creating an "after tax" contribution. Such a result equates the property contributor with the cash contributor who by transferring cash, also makes an "after tax" contribution. This equality is not absolute, however, since cash contributors are entitled to a credit for political contributions,[326] whereas property contributions do not qualify under those provisions.[327]

C. *Tax-Exempt Organizations as Contributors*

As a general rule, certain organizations exempt from taxation under section 501 are not precluded from expending funds for political campaign purposes,[328] but historically there has been little or no guidance from the IRS concerning the tax consequences flowing from the involvement of these tax-exempt organizations in political campaigns.[329] By enacting section 527, Congress provided the needed guidance by generally treating tax-exempt organizations as political organizations to the extent of their expenditures for political purposes.[330] The statute covers organizations that are described in section 501(c) and are tax-exempt under section 501(a).[331] If such an organization expends funds directly

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[323] I.R.C. § 84(b).

[324] Streng, *supra* note 16, at 169.

[325] S. Rep. No. 1357, *supra* note 18, at 33, U.S. Code Cong. & Ad. News at 7509. *See also* Rev. Rul. 68-503, 1968-2 C.B. 44, 44.

[326] See note 231 and accompanying text *supra*.

[327] See note 232 and accompanying text *supra*.

[328] I.R.C. § 501. *Contra, id.* § 501(c)(3) (organizations described therein are absolutely prohibited from political campaign participation); Treas. Reg. § 1.501(c)(4)-(1) (1959) (as to "social welfare" does not include political participation).

[329] Streng, *supra* note 16, at 157.

[330] I.R.C. § 527(f)(1).

[331] *Id.*

or indirectly[332] for an "exempt function," there will be a limited abatement of its tax-exempt status. It must therefore include in its gross income for the year the lesser of its net investment income[333] or the amount of the expenditure for the exempt function, subjecting it to the tax imposed upon "political organization taxable income"[334] as if the included amount constituted such income.[335] These tax problems can be avoided, however, by having the tax-exempt organization establish and maintain, if otherwise consistent with its exemption,[336] a "separate segregated fund"[337] to receive and expend directly all funds related to political campaigns. Through this method, the fund itself will be treated as an entirely separate "political organization."[338]

D. *Gift Tax Aspects*

1. History

In 1959, the IRS formalized its position on the consequences of the gift tax laws upon political contributions by specifically ruling that political contributions were subject to the gift tax laws whether made to the campaign organization or to the candiate.[339] The ruling provided, however, that the $3000 annual exclusion, the $30,000 lifetime exemp-

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[332] An indirect expenditure could be made through another corporation. *Id.* Since Congress indicated that it did not intend for the tax-exempt organization to be "absolutely liable" for the expenditures of other organizations to which it donates funds, it can avoid taxation or indirect political contributions by taking reasonable precautions against the expenditure of such funds by the recipient organization for political activities, S. REP. No. 1357, *supra* note 18, at 29, U.S. CODE CONG. & AD. NEWS at 7505-06, or by establishing a separate segregated fund, see notes 336 through 338 and accompanying text *infra*.

[333] I.R.C. § 527(f)(2) (interest, dividends, rents, royalties and the excess of gains over losses from sale or exchange of assets less expenses directly related to production of such income).

[334] *Id.* § 527(c).

[335] *Id.* § 527(f)(1).

[336] Congress clearly indicated that this provision is applicable only to those section 501(c) organizations otherwise permitted by the tax laws to participate in political activities, S. REP. No. 1357, *supra* note 18, at 29, U.S. CODE CONG. & AD. NEWS at 7505, and did not abate the prohibition against the participation in political activities by particular types of tax-exempt organizations, notably § 501(c)(3) organizations. *Id.*, U.S. CODE CONG. & AD. NEWS at 7505.

[337] For example, the Committee on Political Education (COPE) of the AFL-CIO. Streng, *supra* note 16, at 158 n.105.

[338] S. REP. No. 1357, *supra* note 18, at 30, U.S. CODE CONG. & AD. NEWS at 750. *See also* I.R.C. § 527(f)(3).

[339] Rev. Rul. 59-57, 1959-1 C.B. 626, 626. This ruling has not been considered by the courts. *See* Lehrfeld, *The Gift Tax Implications of Political Contributions*, 54 A.B.A.J. 1032, 1032 (1968); *cf.* Stern v. United States, 436 F.2d 1327, 1330 n.3 (5th Cir. 1971) (explicitly refused to consider the validity of Rev. Rul. 59-57).

tion and the gift tax splitting provisions of the gift tax laws were applicable to such political gifts[340] and, presumably, all other gift tax laws were also applicable.[341] Congress strongly suggested that it approved of the position adopted by the IRS when it amended[342] section 2522(a) (2)[343] in 1969.[344] That amended section provided that the gift tax charitable deduction would not be allowed if a gift was made to an organization engaging in political campaign activity. However, application of the gift tax to political contributions was not litigated until 1971 when the Fifth Circuit held, deciding whether political contributions were properly subject to the gift tax, that political contributions like any other transfer were not gifts if made to advance or protect either a personal or property interest of the taxpayer since there was a benefit flowing to the taxpayer-contributor in return.[345]

Curiously, while reaffirming its contention that political contributions were taxable as gifts, the IRS issued a ruling providing a method for avoiding the gift tax.[346] This ruling's announced purpose was to deal with "the circumstances under which political organizations [would] be recognized as separate donees" for the application of the $3,000 annual per donee exclusion.[347] The ruling both approved of and encouraged the previously established practice of allowing the proliferation of the number of organizations established to accept contributions for the same candidate although the sole purpose of such organizations was to facilitate avoidance of the gift tax on political contributions through the

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[340] Rev. Rul. 59-57, 1959-1 C.B. 626, 627-27.

[341] *See* Lehrfeld, *supra* note 339, at 1033. For example, retention of control over the contribution or a transfer for consideration precludes the finding of a gift, and the making of a loan to a political organization is a gift only upon payment's being forgiven by the contributor. *Id.*

[342] Act of Dec. 30, 1969, Pub. L. No. 91-172, 83 Stat. 487.

[343] I.R.C. § 2522(a)(2).

[344] *See generally* 40 CIN. L. REV. 382, 390 (1971). The IRS had already taken a similar position with respect to political parties and candidates. *See* Rev. Rul. 59-57, 1959-1 C.B. 626, 627.

[345] Stern v. United States, 436 F.2d 1327, 1330 (5th Cir. 1971) (contributions were "in the ordinary course of business," "bona fide," "at arms-length," and "free from donative intent," and therefore considered to be for "an adequate and full consideration in money or money's worth" under Treas. Reg. § 25.2512-8 (1958)). *See generally* 12 B.C. INDUS. & COM. L. REV. 1268 (1971); 40 CIN. L. REV. 382 (1971); 46 TUL. L. REV. 344 (1971). However, in Rev. Rul. 72-583, 1972-2 C.B. 534, 534, the IRS announced its nonacquiescence, stating that it will follow *Stern* only in identical Fifth Circuit cases.

[346] Rev. Rul. 72-355, 1972-2 C.B. 532, 532. *See also* Rev. Rul. 74-199, 1974-1 C.B. 285, 285 (evidentiary requirements); Rev. Rul. 77-131, 1977-1 C.B. 295, 295 (several contributions to organizations supporting the same candidates were taxable gifts even though the organizations were not separate donees).

[347] Rev. Rul. 72-355, 1972-2 C.B. 532, 532.

judicious use of multiple annual per donee exlusions by making multiple contributions to multiple organizations.[348] This ruling provided that the political organization, rather than the candidate it supported, was the recipient of the political contributions. Furthermore, each individual political organization was to be recognized as a separate donee unless the organizations supported identical candidates, had virtually the same officers and had "no substantial independent purpose."[349] Furthermore, the IRS set forth an objective method for determining compliance with these criteria by ruling that neither the officers nor candidates were "essentially the same" if one-third or more of each category was different in each organization.[350] If the organizations failed to achieve independent recognition, then a taxpayer's contributions to them were deemed to be to the same donee, and were therefore aggregated in applying the annual per donee exclusion.[351] While tax accountants and attorneys were calculating and publishing formulations designed to establish with mathematical precision the exact number of officers and organizations necessary to utilize the ruling favorably, the ruling itself was being criticized by commentators[352] and challenged in the courts on the basis of substantive legal considerations.[353] This litigation resulted in the invalidation of the ruling by a district court, although the basic proposition that political contributions were taxable gifts remained unaffected.[354] A final adjudication of this matter was not reached, however, since the issues were mooted by congressional action prior to a final appeal.[355]

2. Present Law

Recognizing that much uncertainty existed regarding whether political contributions were properly subject to the gift tax and believing that it was not appropriate to utilize the tax laws to regulate political contributions,[356] Congress in 1975 amended section 2501.[357] As a result

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[348] *See generally* Comment, *supra* note 9, at 324.

[349] *See* Rev. Rul. 72-355, 1972-2 C.B. 532, 532.

[350] *Id.*

[351] *Id.*

[352] *See* Kaplan, *supra* note 13, at 342-44; Streng, *supra* note 16, at 174-79; Comment, *supra* note 9, at 326-29.

[353] *See generally* Comment, *supra* note 9, at 327.

[354] Tax Analysts and Advocates v. Shultz, 376 F. Supp. 889, 899-900 (D.D.C. 1974), *appeal dismissed sub nom.* Tax Analysts and Advocates v. Simon, 512 F.2d 991 (D.C. Cir. 1975) (remanding for dismissal by stipulation as moot).

[355] See notes 356 through 358 and accompanying text *infra.*

[356] S. REP. No. 1357, *supra* note 18, at 32, U.S. CODE CONG. & AD. NEWS at 7508.

[357] Act of Jan. 3, 1975, Pub. L. No. 93-625, § 14(a), 88 Stat. 2121 (codified at I.R.C. § 2051(a)(5)).

the gift tax is no longer applicable to either a contribution of money or property to any political organization defined under section 527(e)(1) of the income tax laws.[358]

3. Analysis

The course taken by Congress was correct for several reasons. First, if political contributions are treated as gifts subject to the gift tax, the position of the IRS—that of treating each political organization as a separate donee for purposes of the annual per donee exclusion—would be inconsistent with the "conduit theory" applicable in similar gift tax contexts. For example, in the application of the gift tax to gifts in trust, a previous Supreme Court decision had held that the beneficiary and not the trust itself was the donee of the gift.[359] Otherwise the donor could avoid the permissible exemptions and exclusions by creating multiple trusts for a single beneficiary. Furthermore, the IRS had provided that gratuitous transfers of property to corporations were to be generally treated as having been made to the individual shareholders rather than to the corporation.[360] Therefore, it should similarly follow from this reasoning that the contribution should have been deemed to have been made to the ultimate recipient, the candidate himself, rather than to the initial recipient, the campaign organization. To this extent the IRS position was apparently "incorrect as a matter of tax law."[361]

Additional analysis fails to reveal any strong policy reason favoring the application of the gift tax to political contributions. While a political contribution exception from the gift tax will unquestionably increase the political influence of wealthy taxpayers through the encouragement of large contributions, the original purpose of the gift tax is unrelated to the establishment of "any public policy affecting the political process."[362] While Congress had indicated that the definition of a "gift" was meant to include all donative property transfers not specifically exempted,[363] the gift tax was enacted in connection with the estate tax primarily in an effort to minimize the reduction in tax revenues resulting from inter vivos transfers made in avoidance of the estate tax.[364]

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[358] I.R.C. § 527(e)(1).

[359] Helvering v. Hutchings, 312 U.S. 393, 397 (1941); *cf.* Estelle Morris Trusts v. Commissioner, 51 T.C. 20, 43 (1968), *aff'd per curiam*, 427 F.2d 1361, 1362 (9th Cir. 1970) (multiple trusts attacked as shams, without substance or business purposes).

[360] Treas. Reg. § 25.2511-1(h)(1) (1958).

[361] Kaplan, *supra* note 13, at 343.

[362] *Id.* at 347.

[363] S. REP. No. 665, 72d Cong., 1st Sess. 39 (1932).

[364] Kaplan, *supra* note 13, at 341.

Political contributions are not generally made to avoid the estate tax.[365] However, the statutory definition of a gift merely provides that a transfer be "for less than adequate and full consideration"[366] and the application of this definition to political contributions, coupled with the fact that political contributions did not qualify for the gift tax charitable deduction, led the IRS to believe such contributions had to be classified as taxable gifts.[367] Since the application of the gift tax to political contributions would be incongruent with the stated purpose of the law, Congress appropriately decided that political contributions should be excluded from the provisions of the gift tax system.[368]

CONCLUSION

From the foregoing discussion it becomes readily apparent that Congress has resolved many of the uncertainties and controversies in the area of taxation of political campaigns,[369] especially since 1971. As a result, tax laws have become a significant factor to be considered in the management of an effective political campaign. Proper management requires careful advance tax planning to minimize the tax effects imposed upon the campaign organization, the candidate and the contributor, and, consequently, new areas of practice for both the legal and accounting professions have emerged. In the past few years, the IRS has been unable to ignore this sensitive area, and its position in regard to the tax aspects of political campaigns has been modified accordingly. Indeed, this area of the law has become a "focal point" in campaign financing reform efforts.[370] As a final word of warning, it should be noted that every political campaign is presently susceptible to an increasing level of scrutiny as well as the possibility of an audit by the IRS, and that a failure to comply with the applicable tax laws in this field can lead to a disastrous situation for all parties connected with the campaign.[371]

W. Eugene Magee

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[365] *See* Streng, *supra* note 16, at 174.

[366] I.R.C. § 2512(b).

[367] *See* Kaplan, *supra* note 13, at 341.

[368] S. REP. NO. 1357, *supra* note 18, at 32, U.S. CODE CONG. & AD. NEWS at 7508.

[369] *See* Streng, *supra* note 16, at 179.

[370] *See generally* Comment, *supra* note 9, at 335.

[371] *See generally* J. OF ACCOUNTANCY, *supra* note 1, at 39-40.

RECENT DECISIONS

FEDERAL JURISDICTION—ABSTENTION—JUDICIAL ECONOMY AS A GROUND FOR FEDERAL ABSTENTION

Respondent[1] petitioned the Seventh Circuit Court of Appeals for a writ of mandamus[2] directing a federal district court judge[3] to adjudicate immediately respondent's claim filed in the district court for damages under rule 10b-5 of the Securities and Exchange Commission regulations.[4] Despite the existence of concurrent state court proceedings involving identical parties and issues,[5] the court

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[1] Respondent, Calvert Fire Insurance Co., was originally sued in Illinois state court by American Mutual Reinsurance Co. for rescinding its membership in a reinsurance pool operated by American. American Mutual Reinsurance Co. v. Calvert Fire Ins. Co., 52 Ill. App. 3d 922, 367 N.E.2d 104, 106 (1977). Respondent counterclaimed for damages, alleging that the plaintiff had violated the Securities Act of 1933, 15 U.S.C. §§ 77a to 77aa (1976), 367 N.E.2d at 106-07, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a to 78hh-1 (1976), 367 N.E.2d at 107, and the Illinois Securities Act, ILL. REV. STAT. ch. 121 ½, §§ 137.1 to 137.16 (1973), 367 N.E.2d at 107. Respondent on the same day filed a complaint against American in the United States District Court for the Northern District of Illinois for damages resulting from American's alleged violation of rule 10b-5 of the Securities and Exchange Commission regulations, which under § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976), is exclusively enforceable in the federal courts, and joined claims based on each of the other defensive counts made in the state court action. Upon a motion by American to dismiss or abate the federal court action, petitioner stayed all aspects of the federal action except the rule 10b-5 claim, which he took no immediate action upon. Petitioner thereafter rejected motions to reconsider his stay order and refused to certify an interlocutory appeal. Will v. Calvert Fire Ins. Co., 98 S.Ct. 2552, 2555-56 (1978).

[2] 28 U.S.C. § 1651 (1976) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[3] The district judge was Judge Hubert L. Will of the Northern District of Illinois. Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 793-94 (7th Cir. 1977).

[4] Rule 10b-5 provides that:

> It shall be unlawful for any person . . .
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact . . . or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1976).

[5] Respondent argued that not all issues were before the state court because of the federal court's exclusive jurisdiction over the rule 10b-5 claim and that petitioner should not proceed with the entire case. Petitioner rejected this argument noting that the state court was bound to provide the equitable relief sought by respondent by recognizing a valid rule 10b-5 claim as a defense to the state action. 98 S.Ct. at 2556. This argument was based on the respondent's answer in the state court action which expressly contended that the alleged violation of rule 10b-5 afforded a rescission of the purchase of the security. This was the identical relief sought in the federal complaint. 98 S.Ct. at 2556 n.1.

of appeals issued the writ of mandamus, ruling that this was not an exceptional circumstance warranting a stay of federal court action.[6] On writ of certiorari the United States Supreme Court, *held,* reversed. Although subject to review on a proper interlocutory appeal, the decision to defer on the basis of judicial economy to concurrent state court proceedings should be left to the discretionary authority of the federal district court. *Will v. Calvert Fire Insurance Co.,* 98 S. Ct. 2552 (1978).

A federal court's discretionary authority to defer to concurrent state court proceedings has been commonly referred to as "abstention."[7] Although the abstention doctrine has gained widespread acceptance in the last forty years,[8] a federal court's authority to abstain has not always been recognized. In 1821, a federal court's obligation to hear cases properly before it was recognized when Justice Marshall in *Cohens v. Virginia*[9] spoke of a federal court's duty to assume jurisdiction.[10] Accordingly, the privilege to proceed to trial in federal court has been referred to as an absolute privilege.[11] Despite strict early adherence to

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[6] Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 797 (7th Cir. 1977), *rev'd,* 98 S. Ct. 2552 (1978).

The court of appeals based its decision on its interpretation of Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976). See notes 47 through 53 and accompanying text *infra.* The court of appeals admitted that prior to *Colorado River,* the controlling case would have been Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970). Under *Aetna's* broad recognition of the district court's discretionary authority, the court of appeals would have affirmed the stay. 560 F.2d at 795. However, after *Colorado River,* the court of appeals felt it had no choice but to overrule *Aetna* and in the present case revise the district court's decision to abstain. *Id.* at 796-97.

[7] Shapiro, *Abstention and Primary Jurisdiction: Two Chips Off the Same Block—A Comparative Analysis,* 60 CORNELL L. REV. 75, 76 (1974) (citing 1A J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE § 0.203[1]-[2] (2d ed. 1974)).

[8] *See generally* 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE § 0.203 [1]-[2] (2d ed. 1978); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52, at 218 (3d ed. 1976); Wright, *The Abstention Doctrine Reconsidered,* 37 TEX. L. REV. 815 (1959); 73 HARV. L. REV. 1358 (1960).

[9] 19 U.S. (6 Wheat.) 264 (1821).

[10] It is most true, that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id. at 404; *accord,* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); McClellan v. Carland, 217 U.S. 268, 281 (1910).

[11] McClellan v. Carland, 217 U.S. 268 (1910) is the case usually relied on to support this proposition. In *McClellan,* a federal district court had issued a stay order in deference to concurrent state court proceedings. The court of appeals issued a writ of mandamus directing the district court to hear the case. The Supreme Court upheld the court of appeals' decision, stating that a federal district court could be directed by writ of mandamus to proceed with a case it had stayed in deference to concurrent state proceedings.

Marshall's "federal jurisdiction rule,"[12] the abstention doctrine emerged in the 1940s and has continued to expand in scope and acceptance.[13]

Deference to state court proceedings by a federal court has been justified on several bases, all of which fall under the broad heading of abstention. Although the exact boundaries of abstention are uncertain, a majority of federal abstention decisions can be classified as one of three traditional types of abstention.[14] One category of cases involves claims that state action is contrary to the United States Constitution, but questions of state law exist that may dispose of the case.[15] The case that best exemplifies this type of abstention, *Railroad Commission v. Pullman Co.*,[16] is often credited as the originator of the entire abstention doctrine. As were most early abstention cases, *Pullman* was a case in equity which involved both a federal constitutional claim and an issue of unclear state law.[17] In an attempt to avoid a premature constitutional decision, the United States Supreme Court refused to rule on the constitutional question and ordered the federal trial court to abstain pending a final decision from the state court.[18] This method, the Court reasoned, would allow the state court an

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"[T]he pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court . . . ." *Id.* at 282. The Court concluded that both the state and federal actions should go forward until one of them resulted in a judgment that could be asserted as res judicata in the other. *Id.*

Although the Court in *McClellan* inferred that a state judgment could be asserted as res judicata in a concurrent federal case, it is not clear whether the federal courts have accepted this possibility. Instead, it has been suggested that federal cases involving federal claims are immune from any res judicata effects of a state proceeding. *See* Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 187-90 (2d Cir.), *cert. denied,* 350 U.S. 825 (1955), and 53 VA. L. REV. 1360 (1967), for good discussions on the topic.

[12] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

[13] Landis v. North Am. Co., 299 U.S. 248 (1936), see note 35 and accompanying text *infra,* signaled the beginning of an abstention doctrine that would be officially recognized in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), see note 16 and accompanying text *infra,* and expanded in every decade since.

[14]University of Texas law professor Charles A. Wright, one of the foremost authorities on our federal court system, prefers to view the abstention doctrine as four separate doctrines, each involving a different set of circumstances. The various abstention cases are separated into: (1) constitutional cases, (2) nonconstitutional cases, (3) unsettled state law cases, and (4) cases where, for reasons of judicial economy, it would be convenient to abstain. C. WRIGHT, *supra* note 8, § 52, at 218; Wright, *supra* note 8, at 827. However, the fourth abstention doctrine, judicial economy, is relatively new in its recognition as a separate doctrine by the legal community. For a discussion of this fourth doctrine, see notes 33 through 63 and accompanying text *infra.*

[15] See notes 16 through 21 and accompanying text *infra;* Wright, *supra* note 8, at 816.

[16] 312 U.S. 496 (1941).

[17] The case centered around the question of whether an order of a state railroad commission requiring sleeping cars to be continuously in the charge of an employee having the rank and position of pullman conductor discriminated against blacks in violation of the fourteenth amendment. All the conductors were white and the cars had previously been supervised by porters, all of whom were black. The Texas Railroad Commission's authority to make such an order was unclear under existing state law. *Id.* at 497-99.

[18] *Id.* at 501-02.

opportunity to resolve the unclear question of state law, and could make consideration of the constitutional issue unnecessary.[19] The Court further justified its ruling by noting that a state court is not bound to follow a federal court's interpretation of state law and can in effect "overrule" the federal court if it so desires.[20] *Pullman* became the first in a long line of cases in which a federal trial court stayed proceedings because the case involved a federal constitutional question combined with questions of state law.[21] A second type of abstention has been applied when a federal court wishes to avoid unnecessary interference in a state's handling of its own affairs.[22] In *Burford v. Sun Oil Co.*,[23] the Court held that state law questions concerning regulation of local industry were so closely connected to the state's interests that the federal court should defer to the state court for settlement of the issues.[24] Although both *Pullman* and *Burford* were cases in equity, the cases represent two distinct grounds for abstention. The *Pullman* Court abstained to avoid unnecessary decision of a constitutional question, while in *Burford,* the Court deferred to a state's overriding interest in a certain area of state law.[25] A third type of abstention, recognized in cases dealing with questions of unsettled state law,[26] was initially rejected by the Supreme

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[19] The Court stated that "[s]uch constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy." *Id.* at 498.

[20] *Id.* at 500-01.

[21] *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510 (1972) (abstention is justified when the challenged state statute is susceptible to a construction by the state courts that would avoid or modify the federal constitutional question); United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 136 (1962) (per curiam) (the decision of a federal question should be deferred until a potentially controlling state law issue is decided); Harrison v. NAACP, 360 U.S. 167, 176 (1959) (the federal courts should not decide the constitutionality of state enactments fairly open to interpretation until the state courts have had reasonable opportunity to pass upon them); Shipman v. DuPre, 339 U.S. 321, 322 (1950) (per curiam) (a federal district court should not pass upon the constitutionality of a state statute that has not yet been interpreted by the state courts); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 460 (1945) (the Supreme Court will not review a state court decision upholding the constitutionality of a state statute where there has been no authoritative construction of the statute in the state courts); *accord,* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 104-05 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 172 (1942).

[22] Wright, *supra* note 8, at 819.

[23] 319 U.S. 315 (1943).

[24] *Id.* at 332. At issue in *Burford* was the validity of an order of the Texas Railroad Commission granting the appellant a permit to drill oil wells on a particular plot. *Id.* at 317. The Commission had the responsibility under state law of organizing the method by which the oil reserves in Texas could best be used and protected. *Id.* at 322. The Court decided the order of the Commission could be best examined in state court. *Id.* at 327, 332.

[25] Another difference is that, contrary to the generally accepted rule in abstention cases, in *Burford*-type abstention, the federal action is normally dismissed altogether rather than retained awaiting the outcome of the state court action. Abstention traditionally implies retention of federal jurisdiction pending the outcome of the state court proceeding. *See* C. WRIGHT, *supra* note 8, § 52 at 222.

[26] Wright, *supra* note 8, at 822.

Court in *Meredith v. City of Winter Haven.*[27] The issue before the United States Supreme Court was whether a court of appeals had erred in declining to exercise its jurisdiction on the ground of unsettled state law.[28] The Supreme Court reversed the abstention order, stating that a federal court's difficulty in interpreting state law is not sufficient ground for refusing to decide a case.[29] For several years following *Meredith,* the Court consistently refused to approve abstention orders based solely on the difficulty of state law questions.[30] In 1959, however, two cases involving eminent domain proceedings cast doubt on the continued validity of *Meredith.* The more important of the two is *Louisiana Power & Light Co. v. City of Thibodaux,*[31] where the Court held that a federal court should not decide an unsettled state law question if the decision would disrupt implementation of important programs of a state government.[32]

In recent years, a fourth type of abstention has developed which allows a federal judge, because of an overcrowded docket or for mere convenience, to defer or delay adjudication of a case concurrently pending before a state court.[33] The rapid increase in the workload of federal district courts has contributed to a growing acceptance of this fourth basis for abstention among the district courts and courts of appeal. Prior to 1978, however, the United States Supreme

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[27] 320 U.S. 228 (1943). This case involved the issue of whether the city of Winter Haven had authority to issue certain bonds without a referendum. *Id.* at 232.

[28] *Id.* at 229.

[29] *Id.* at 235.

[30] *See* Sutton v. Leib, 342 U.S. 402, 410 (1952) (whether a party's obligation to pay alimony has terminated is a matter of state law that the federal courts should decide); Propper v. Clark, 337 U.S. 472, 490 (1949) (where a case involves a nonconstitutional federal issue connected to difficult matters of state law, the federal courts should not defer to the state court but should decide both issues); Williams v. Green Bay & W.R.R., 326 U.S. 549, 553 (1946) (so long as diversity jurisdiction remains, parties will not be remanded to state court merely because of difficulty in making a decision in federal court).

[31] 360 U.S. 25 (1959). The other case decided on the same day was County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959). This case involved a dismissal of a state action by the district court on grounds that "it 'should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding.'" *Id.* at 188. The Supreme Court upheld the court of appeals' reversal of the dismissal stating that abstention should not apply. *Id.* at 196. The Court came to that conclusion because the state law in the case was settled, so all the district court had to do was decide the facts, and because dismissal of the action was too drastic a step, requiring additional time and expense. *Id.*

[32] 360 U.S. at 30. In *Thibodaux,* the authority of the state to take certain lands through the power of eminent domain was challenged by a landowner who argued that state law prohibited such a taking. The Supreme Court for the first time deferred to the state court for an interpretation of state law. *Id.* Unlike *County of Allegheny,* the district court simply deferred to the state court rather than dismissing the federal case completely. *Id. Thibodaux* is also notable for two other reasons. Unlike *Pullman* and *Burford,* the case was nonequitable in nature, *id.* at 28-29, thus eliminating any limitation of the abstention doctrine to equity cases. Furthermore, the Court made no suggestion that the state law issue involved must be a technical question relating to complex regulation by a state agency as in *Burford.*

[33] Wright, *supra* note 8, at 823.

Court had not recognized this form of abstention.[34] The lower federal courts had relied on dictum from earlier Supreme Court cases[35] to justify their decisions on the basis of inherent discretionary authority to abstain. *Brillhart v. Excess Insurance Co. of America*[36] is one case frequently cited to justify the fourth abstention doctrine.[37] In dismissing a federal suit in deference to a concurrent state proceeding, the *Brillhart* Court stated that it would be uneconomical for a federal court to proceed in a declaratory judgment suit while another suit involving the same issues and parties is pending in a state court.[38]

The first noteworthy abstention decision based on judicial convenience and overcrowded dockets was the 1949 case of *Mottolese v. Kaufman.*[39] Unable to justify abstention based on the traditional abstention doctrines, the Second Circuit nevertheless upheld the stay on the ground that a federal district court has discretionary authority to defer to concurrent state court proceedings involving similar issues and parties.[40] In another case that had a marked effect on subsequent abstention decisions, *P. Beiersdorf & Co. v. McGohey,*[41] the Second

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[34] The Second Circuit in Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949), see note 39 and accompanying text *infra,* was the first court of appeals to recognize this form of abstention. Other courts of appeals then followed *Mottolese* in recognizing this new abstention doctrine. See notes 46 through 55 and accompanying text *infra.* As evidence that the Supreme Court had not recognized this form of abstention, see the discussion in Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 813-18 (1976).

[35] Landis v. North Am. Co., 299 U.S. 248 (1936) was frequently cited to justify this form of abstention. The *Landis* Court stated, "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254; *accord,* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183-84 (1952) (lower courts must have ample degree of discretion for wise judicial administration). *Landis* did not involve deference to state court proceedings, but concerned abstention by one federal court in deference to a concurrent proceeding in another federal court. 299 U.S. at 249-50.

[36] 316 U.S. 491 (1942). In this case, the Excess Insurance Company brought a suit under the Federal Declaratory Judgment Act to determine its rights under a reinsurance agreement. The federal suit was preceded by a garnishment proceeding in a Missouri state court. Dismissal of the federal suit was sought on the ground that the issues involved could be decided fully in the state proceeding. *Id.* at 492-93.

[37] The *Brillhart* Court stated, "Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Id.* at 495.

[38] *Id.* Despite language in *Brillhart* that appears to support abstention based on judicial economy, the Supreme Court prior to 1978 had not recognized *Brillhart* as supporting that theory. See note 34 and accompanying text *supra.* The reason evidently was that *Brillhart* involved a suit for declaratory relief and said nothing about a court's power when two diversity suits are involved. *See* Will v. Calvert Fire Ins. Co., 98 S. Ct. 2552, 2562 (1978) (Brennan, J., dissenting). Also, it resulted in a dismissal of the federal case, whereas normally, abstention involves retention by the federal court of the case on its docket pending the outcome of the state proceeding. See note 25 *supra.*

[39] 176 F.2d 301 (2d Cir. 1949). The district court judge, in deference to a pending state court action, had ordered a stay of a shareholder's action brought in federal court. *Id.* at 304.

[40] *Id.*

[41] 187 F.2d 14 (2d Cir. 1951).

Circuit relied on *Mottolese* in refusing to order a writ of mandamus directing the district court to reverse a stay order.[42] Expanding the holding in *Mottolese*, the court upheld the district court's complete rejection of Justice Marshall's "federal jurisdiction rule" which requires a federal court to hear all cases properly before it.[43] In 1973, the Second Circuit further expanded *Beiersdorf* when it held that a federal district court judge could abstain, in deference to concurrent state court proceedings, from adjudicating a federal claim over which the federal courts are granted exclusive jurisdiction.[44] The court justified its decision by observing that, although the state court could not hear the exclusively federal claim, it could nevertheless entertain common law claims and defenses, such as res judicata and the statute of limitations, that might dispose of the federal claim.[45]

Following the example set by the Second Circuit, several other courts of appeals have upheld decisions by federal district court judges to abstain on grounds of judicial economy. In 1967, the Fourth Circuit relied on *Mottolese* and upheld a federal district court judge's exercise of his discretionary power to abstain in a diversity action.[46] One of the reasons given by the court for this decision was the desire to protect the defendant from unwarranted and uneconomical litigation.[47] The Fifth Circuit has also considered and recognized the fourth abstention doctrine. In *Crawford v. Seaboard Coast Line Railroad,*[48] a Georgia district court relied on *Mottolese* when it abstained from adjudicating a diversity action, stating that all issues could be decided in state proceedings concurrently underway.[49] The district court's view was a broad one, seemingly allowing abstention whenever a party has sufficient opportunity to be heard in state court.[50] The Fifth Circuit Court of Appeals has, however, taken a narrower

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[42] *Id.* at 15. The case involved a trademark infringement. *Id.* The district court relied solely on the crowded court docket in ordering the stay. P. Beiersdorf & Co. v. Duke Laboratories, Inc., 97 F. Supp. 287, 289 (S.D.N.Y. 1950).

[43] See note 9 *supra.* The district court had declared that"[t]he statutory privilege of access to a federal court is no longer regarded as absolute." 92 F. Supp. at 288. The district court went on to state that the decision to defer to the concurrent state court proceedings should be left to the discretion of the federal district judge and that a court which is already overloaded with cases should not be called on to duplicate a state court's work when the parties and issues are the same in both cases. *Id.* at 288.

[44] Klein v. Walston & Co., 432 F.2d 936, 937 (2d Cir. 1970). The case involved a fraud action brought under the Securities Exchange Act of 1934 over which the federal courts are granted exclusive jurisdiction. An action based on common law claims was pending in state court. The only reason for granting the stay was the congested calendar of the district court. *Id.*

[45] *Id.*

[46] Amdur v. Lizars, 372 F.2d 103, 107 (4th Cir. 1967). The federal case centered around a shareholder's derivative suit. The plaintiffs had brought a similar action in state court four and one-half years earlier. *Id.*

[47] *Id.*

[48] 286 F. Supp. 556 (S.D. Ga. 1968).

[49] *Id.* at 557-58.

[50] *Id.*

approach. In a 1973 case, *PPG Industries, Inc. v. Continental Oil Co.*,[51] the Fifth Circuit upheld a stay granted by a district court, but emphasized that the mere pendency of a parallel state court action is not sufficient to justify abstention.[52] The court's opinion nevertheless indicated its concern for the increasingly crowded dockets of the federal courts and recognized the need to economize whenever permissible.[53] The Seventh Circuit recognized abstention on the basis of judicial economy in *Aetna State Bank v. Altheimer*.[54] While reversing the lower court's dismissal of the cause the court of appeals sustained the district court's stay of the federal action, holding that the stay was a proper exercise of a court's inherent power to control disposition of cases on its docket and to economize time and effort for itself, for counsel, and for litigants.[55]

The United States Supreme Court found an opportunity to review its stance on abstention in the 1976 case of *Colorado River Water Conservation District v. United States*.[56] Although the case was not decided on the basis of abstention,[57] the Court thoroughly discussed the doctrine and recognized three instances in which abstention would be proper.[58] Abstention based on judicial economy was not among the three instances mentioned by the Court.[59] The Court did not discuss the increasingly overloaded dockets of the federal district courts or any discretionary authority that federal judges might possess to consider court congestion in making an abstention decision. The Court did emphasize that only very exceptional circumstances would justify abstention,[60] and discussed the

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[51] 478 F.2d 674 (5th Cir. 1973). The federal action was for declaratory and injunctive relief. In a concurrent state proceeding, parties and issues were the same. *Id.* at 683.

[52] *Id.* at 682.

[53] *Id.* at 680.

[54] 430 F.2d 750 (7th Cir. 1970). The district court had stayed an action brought under rule 10b-5 in deference to state court proceedings involving the same transaction in which the identical rule 10b-5 claim was raised as an affirmative defense. *Id.* at 755.

[55] *Id.* The Seventh Circuit overruled *Aetna* in 1977. See note 6 *supra*.

[56] 424 U.S. 800 (1976).

[57] In this case, the United States brought an action in federal court asserting water right claims. One of the defendants attempted to make the United States a party to a state action in order to adjudicate all of the government's claims. The United States Supreme Court found that no grounds existed to justify abstention but that dismissal of the federal action was nevertheless warranted because of the McCarran Amendment, 43 U.S.C. § 666 (1976), which provides for consent to join the United States in a state suit for adjudication or administration of water rights. 424 U.S. at 802, 819. The federal policy evinced by the amendment was one of avoiding piecemeal litigation and the disruption of a complicated and extensive system of state allocation and adjudication of water rights. *Id.* at 819.

[58] The situations where abstention was recognized as proper were: (1) where there is a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law, 424 U.S. at 814, (2) where there are unsettled matters of state law and federal review would be a potential interference with a state's administration of its own affairs, *id.* at 815, and (3) where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings. *Id.* at 816.

[59] *Id.* at 813-16.

[60] The doctrine of abstention . . . is an extraordinary and narrow exception

unyielding obligation of the federal courts to exercise the jurisdiction given them.[61] The Court also listed four areas in which a dismissal as opposed to a stay of a federal case would be proper,[62] but it specifically indicated that these areas did not involve abstention and would be subjected to a higher level of scrutiny.[63]

In the instant case, the Court noted that a writ of mandamus is appropriate to compel a district court to exercise jurisdiction when it is the district court's duty to do so, but emphasized that the petitioner must show a clear and indisputable right to adjudication of its claim in federal court.[64] Noting the increasing overlap between state and federal claims and the wide latitude granted a busy judge in setting his own calendar,[65] the Court went on to state that the decision to defer to state court proceedings, even when substantive federal law is involved, is committed to the discretion of the district court.[66] Since the trial judge's decision to defer is discretionary, the Court concluded, the petitioner's right to federal adjudication of his claim is not "clear and indisputable."[67] Thus, although the district court's decision to abstain may be modified on an interlocutory appeal, the writ of mandamus is inappropriate.[68] In response to the contention that abstention is improper where an issue of exclusive federal jurisdiction is involved, the Court noted that the claim for damages, the only exclusively federal issue, had not been stayed. Instead, the claim had merely been delayed because of the district court's excessive caseload.[69]

> to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

Id. at 813 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).

[61] 424 U.S. at 817.

[62] The four exceptional circumstances listed that might justify dismissal include cases in which: (1) the federal forum is inconvenient for the parties, (2) the state court obtained jurisdiction first, (3) piecemeal litigation can be best avoided by the state court's assuming exclusive jurisdiction, and (4) there is no strong federal interest in the particular claim. *Id* at 818.

[63] *Id.*

[64] Will v. Calvert Fire Ins. Co., 98 S. Ct. 2552, 2557 (1978) (citing Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953)).

[65] 98 S.Ct. at 2558.

[66] *Id.*

[67] *Id.* at 2559.

[68] *Id.*

[69] *Id.* at 2559-60. The Court emphasized that Judge Will never issued a deferral order in regard to the rule 10b-5 damages claim and that his delay in adjudicating the damages claim was merely the result of an overloaded docket.

Four Justices dissented stating that since the consequences of delaying the federal claim are the same as would have resulted from an abstention order, the majority's argument is not valid. *Id.* at 2565. The dissent added that since the federal courts are granted exclusive jurisdiction over rule 10b-5 damages claims, a district court should not stay federal proceedings. *Id.* at 2561. The dissent further argued that since *Colorado River*

It seems that the United States Supreme Court, though not explicitly saying so, has moved toward recognizing abstention based on judicial economy.[70] The Court, while not officially recognizing the fourth abstention doctrine, did condone a delay in adjudicating an exclusively federal claim while that issue was being decided in concurrent state court proceedings. The Court did not refer to this procedure as abstention; it called the procedure a "delay."[71] The Court did not use the term "judicial economy" as justification for the delay; it referred to the delay as a "product of a district court's normal excessive workload."[72] Regardless of the labels applied to the district court's action, the results are the same. The state proceedings are allowed to continue without any concurrent federal proceeding and the plaintiff is denied a congressionally granted right of access to federal court. Although the Court attempted to distinguish *Colorado River,* the instant decision is difficult to reconcile with the *Colorado River* Court's emphasis on the unyielding obligation of the federal courts to exercise their jurisdiction.[73]

The Court in the instant case did not discuss the effect of the doctrine of res judicata on a claim given exclusively to the federal courts if concurrent state proceedings are concluded first.[74] The dissent points out that this is an unresolved and difficult issue but, relying on Judge Learned Hand's opinion in *Lyons v. Westinghouse,*[75] indicates that where a claim is given exclusively to the federal courts, any decision issuing from the federal courts should be immune from prejudgment in a state court.[76] Arguably, when Congress awards a claim exclusively to the federal courts, it does not intend that the authority to decide the claim might be successfully thwarted by a state court's determination of that issue raised as an affirmative defense in the state court proceedings.

The Court's decision in the instant case will certainly encourage federal abstention on grounds of judicial economy, though it does not specifically sanction such abstention. Until the Court resolves the controversy with a definitive

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had outlined three areas where abstention is proper and since the present case did not fall within any of them, the stay order and the delay of the federal issue were not appropriate. *Id.* at 2563. Finally, the dissent concluded that since there had been a "clear abuse of discretion" by the district judge, LaBuy V. Howes Leather Co., 352 U.S. 249, 257 (1957), and since mandamus will lie to correct a district court's improper deference to pending state court proceedings, McClellan v. Carland, 217 U.S. 268, 280 (1910), the propriety of the issuance of the writ cannot be questioned. 98 S. Ct. at 2564-65.

[70] See note 33 and accompanying text *supra.*

[71] 98 S. Ct. at 2560.

[72] *Id.*

[73] See note 61 and accompanying text *supra.*

[74] See note 11 *supra.* The Court in the instant case merely stated that the grant of exclusive jurisdiction does not distinguish this case from other abstention cases because both state and federal courts have the authority to grant the desired relief. 98 S.Ct. at 2559 n.9. The Court did not indicate how it would decide the issue if both courts could not grant the desired relief, but the implication is that a district court could not abstain in such a case.

[75] 222 F.2d 184, 189 (2d Cir. 1955).

[76] 98 S. Ct. at 2563.

statement of position, absention on grounds of judicial economy conceivably will continue to expand in the lower federal courts. It is clear that federal district courts should be allowed flexibility in controlling their own dockets and that abstention on grounds of judicial economy is appropriate in some cases. However, the limits of this fourth basis for abstention are unclear and should be more precisely defined by the Supreme Court.

J. Philip Jones

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—FOURTH AMENDMENT REQUIRES VERACITY HEARING AT DEFENDANT'S REQUEST TO CHALLENGE FACTS UNDERLYING FACIALLY SUFFICIENT AFFIDAVIT

At Jerome Franks' trial for rape, kidnapping and burglary,[1] the Delaware Superior Court denied his motion to suppress certain evidence[2] that had allegedly been obtained under an unconstitutional search warrant.[3] Franks had attempted to prove, by presenting testimony that certain factual allegations in the warrant affidavit were false,[4] that the warrant lacked probable cause.[5] The state's objection to the testimony was sustained,[6] Franks' motion to suppress was denied, and he was convicted. On appeal, the Delaware Supreme Court affirmed.[7] On writ of certiorari the United States Supreme Court, *held*, reversed and remanded. The fourth and fourteenth amendments require that a veracity hearing be held at the defendant's request, upon a substantial showing

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[1] Franks was arrested for rape of one Cynthia Bailey while he was in custody for assault of a 16 year old girl. While awaiting a bail hearing, Franks made a statement mentioning Mrs. Bailey to a youth court officer. This statement was then relayed to the police detective who submitted the affidavit in question. Franks v. Delaware, 98 S.Ct. 2674, 2677 (1978).

[2] *Id.* at 2679. The evidence obtained consisted of three articles of clothing and a knife. *Id.*

[3] Franks contended that the warrant violated his fourth and fourteenth amendment rights and that the search was unreasonable because certain statements in the affidavit were allegedly false. *Id.* at 2578.

[4] *Id.* The affidavit contained a section in which the detectives claimed to have spoken personally with two of Franks' co-workers who confirmed that Franks' usual dress fit the description given by the rape victim of her assailant. The testimony offered by Franks was intended to prove that the detective had not spoken personally to the two men. *Id.*

[5] *Id.* "Probable cause" must be shown for a warrant to issue under the fourth amendment. See note 8 *infra*. The most commonly used definition of probable cause is that where the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a man of reasonable caution to hold the belief that an offense has or is being committed, probable cause exists. Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)). *See generally* COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 35 (1972).

[6] 98 S.Ct. at 2677. The state objected on the grounds that (1) any challenge to an affidavit must be limited to the sufficiency of the affidavit on its face, and that (2) the federal cases allowing veracity challenges were distinguishable on the basis of FED. R. CRIM. P. 41(e), which provides for a pretrial suppression motion when a defendant believes evidence was obtained in an unconstitutional search. 98 S.Ct. at 2678. The Court concluded, "This reasoning is misplaced. The Federal Court cases allowing a defendant to challenge the veracity of a warrant affidavit rest on Constitutional footing." *Id.*

[7] *Id.* The Supreme Court decided Franks' fourth amendment claim on the merits, stating that "probable cause and suppression hearings are not adjudications of guilt or innocence and the matters asserted by Franks were more properly considered in a trial on the merits." *Id. But see* Boykin v. Alabama, 395 U.S. 238 (1969), and Raley v. Ohio, 360 U.S. 423 (1959), which held that a decision by a state's highest court of a constitutional question on the merits leaves that question open for review by the United States Supreme Court. 395 U.S. at 241-42; 360 U.S. at 436-37.

that the affidavit includes knowingly, intentionally, or recklessly made false statements which are necessary to the finding of probable cause. *Franks v. Delaware*, 98 S.Ct. 2674 (1978).

Since its enactment, the fourth amendment protection against unreasonable searches and seizures has been the basis of challenges to police search practices.[8] Early cases interpeting the amendment generally held that its purpose was to protect the privacy and security of citizens against unlawful invasions by officers of the law.[9] This protection was secured for all citizens, including criminal defendants, in the 1914 landmark case of *Weeks v. United States.*[10] *Weeks* involved a search without a warrant and the admission of evidence obtained in that search.[11] The Supreme Court found that the warrantless search was unreasonable and was therefore in violation of the petitioner's fourth amendment rights.[12] The Court concluded that while police efforts to bring criminals to justice were valuable, they should not be allowed to violate citizens' constitutional rights.[13] This decision created the "federal exclusionary rule" which provides that evidence seized in an unlawful search cannot be admitted in any federal court.[14]

In 1948, an attempt to apply the exclusionary rule to state police actions through the fourteenth amendment failed in *Wolf v. Colorado.*[15] In *Wolf* the

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[8] U.S. CONST. amend. IV provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[9] *See, e.g.*, Adams v. New York, 192 U.S. 585, 594 (1904) (the amendment was enacted to secure the citizen's person and property against unlawful invasions by officers); Bram v. United States, 168 U.S. 532, 544 (1897) (both fourth and fifth amendments were written to secure humanity and civil liberty); Boyd v. United States, 116 U.S. 616, 630 (1886) (a search is unreasonable when it constitutes the invasion of personal liberty, security, or private property). *See generally* Forkosh, *The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment*, 34 OHIO ST. L.J. 297 (1973).

[10] 232 U.S. 383 (1914). The Court reasoned that the protection against unreasonable searches and seizures must be enforced by all federal officers as a part of their duty under the Constitution. *Id.* at 392.

[11] *Id.* at 387-88. Petitioner Weeks, indicted for illegal use of the mails, made a pretrial request for the return of the documents seized in the search. The Court returned some of the documents but retained those which were to be used as evidence. *Id.* at 388.

[12] *Id.* at 393. The Court held that to allow such a search would be tantamount to declaring that fourth amendment protections are of no value. *Id.*

[13] *Id. See also* Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974).

[14] 232 U.S. at 398. Since its establishment, the exclusionary rule has been the source of much debate. It appears that the primary justification for it is its deterrent effect on illegal police actions. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) (the rule safeguards fourth amendment rights through deterrent effect); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (purpose of rule is to deter lawless police action). *See generally* W. RINGEL, SEARCHES, SEIZURES, ARRESTS, AND CONFESSIONS §§ 1-14 (1972).

[15] 338 U.S. 25 (1948). *See generally* Annot., 93 L.Ed. 1796, n.2 (1948) (cases prior to 1948 holding in accord with *Wolf*).

petitioners were convicted after evidence obtained in an unreasonable search was admitted.[16] In affirming the Colorado Supreme Court's decision, the United States Supreme Court held that even though the fourth amendment protection against invasion of privacy was applicable to the states, the method of enforcing the protection should be left to the states.[17] The *Wolf* rule remained in effect until 1961 when it was overruled by *Mapp v. Ohio.*[18] In *Mapp,* state officers had burst into the petitioner's home without presenting a warrant and had seized allegedly obscene material.[19] The Supreme Court held that since the right to privacy from invasion by the states had been secured in *Wolf,* and since the sanction for such invasions was the exclusionary rule developed in *Weeks,* the exclusionary rule should also be applied, through the due process clause of the fourteenth amendment, to state invasion of privacy.[20]

Following *Mapp,* courts developed several grounds for declaring searches unreasonable and excluding evidence obtained through the search.[21] One of the most common rules required exclusion of evidence obtained under a search warrant whose supporting affidavit did not show probable cause.[22] The basic requirements for showing probable cause in an affidavit were set out in 1964 in *Aguilar v. Texas.*[23] The petitioners in *Aguilar,* convicted on evidence obtained

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[16] 338 U.S. at 26. The Court did not specify the exact grounds on which the search was declared unreasonable since there was no mention of whether it was conducted without a warrant or with an invalid one.

[17] *Id.* at 32. Mr. Justice Frankfurter speaking for the majority held that rights "implicit in ordered liberty" were extended to the states, but did not require states to exclude all evidence unconstitutionally obtained. *Id.* at 27-28.

[18] 367 U.S. 643 (1961).

[19] *Id.* at 645. It was alleged by the State that a warrant had been issued, but no warrant was produced at trial and the court concluded that there probably had never been one. *Id.*

[20] *Id.* at 655. The majority stated: "Having once recognized that the right of privacy embodied in the Fourth Amendment is enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is . . . constitutional in origin, we can no longer permit that right to remain an empty promise." *Id.* at 660. Insofar as *Wolf* allows admission of unconstitutionally seized evidence in state courts, it was overruled by *Mapp. Id.* at 643.

[21] C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 673, at 106. The grounds include:

> (1) That property was illegally seized without a warrant; (2) the warrant was insufficient on its face; (3) the property seized was not that described in the warrant; (4) there was no probable cause for believing the existence of the grounds on which the warrant was issued; or (5) the warrant was illegally executed.

Id. These challenges are brought in Federal Court under FED. R. CRIM. P. 41(e). See note 6 *supra.* State courts generally follow the same type procedure. An example is Henry v. State, 174 So. 2d 348 (Miss. 1965), which held that a person desiring to suppress evidence wrongfully seized may do so by making a pretrial motion *similar to the motion allowed in federal court. Id.* at 351 (emphasis added).

[22] *See generally* Comment, *Challenges to the Veracity of Facially Sufficient Search Warrants—Is the Truth Relevant?,* 7 SETON HALL L. REV. 827 (1976).

[23] 378 U.S. 108 (1964).

with a warrant based on informant allegations,[24] claimed the warrant did not state sufficient grounds for probable cause.[25] Agreeing with the petitioner, the Court held that an affidavit for a search warrant must contain sufficient information to allow a magistrate to make a neutral, well informed decision concerning the presence of probable cause.[26] Additionally, the affidavit must be based on more than the affiant's belief or suspicion.[27] Since the affidavit in *Aguilar* did not state facts sufficient for a finding of probable cause, the Court concluded that the evidence should have been excluded.[28]

The holding in *Aguilar* was based on a challenge to probable cause shown on the face of the affidavit. Recent case law has developed an additional challenge based on a claim that false statements in an affidavit may defeat any probable cause shown on its face.[29] Such challenges, commonly called veracity challenges, were first discussed and disallowed in the 1931 district court case of *United States v. Brunett.*[30] In *Brunett,* a defendant's motion to suppress evidence had been denied following his allegation that the affiant had made a false statement in the affidavit for the search warrant.[31] The court affirmed the denial and held that, provided all the allegations on the face of the affidavit were sufficient to justify a finding of probable cause, the defendant could not attack the truthfulness of the underlying facts.[32] Challenges to the truthfulness of affidavits could not be sustained, the court reasoned, since the commissioner was not required to investigate the truthfulness of the affidavits and since forcing him to do so would interfere with his judicial function.[33] Thirty-three years later

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[24] *Id.* at 109. The evidence was admitted over the petitioner's objections, and he was convicted of heroin violations. *Id.* at 110.

[25] *Id.* at 115-16.

[26] *Id.* at 111. The Court, in Nathanson v. United States, 290 U.S. 41 (1933), held that the magistrate must be "neutral and detached" and his decision on the presence of probable cause must be based on the information put before him. *Id.* at 47.

[27] 378 U.S. at 112 (*citing* Nathanson, *supra* note 26, at 46).

[28] 378 U.S. at 116. *But see* Jones v. United States, 362 U.S. 257, 271 (1960) (warrant valid if sufficient basis for informant's credibility shown).

[29] C. WRIGHT, *supra* note 21, at 106.

[30] 53 F.2d 219 (W.D. Mo. 1931).

[31] *Id.* at 225. The defendant had been convicted of illegal possession of liquor after the admission of evidence secured in a search pursuant to a warrant issued by a United States Commissioner. Brunett contended that the special agent who submitted the affidavit in which he claimed to have purchased wine from Brunett had never in fact done so. *Id.* The second ground for the suppression motion was that the things seized were not authorized to be seized by the warrant. See note 21 *supra.* The lower court denied his motion on both grounds. 53 F.2d at 225.

[32] 53 F.2d at 225. In Gracie v. United States, 15 F.2d 644 (1st Cir. 1926), *cert. denied,* 273 U.S. 748 (1927), the court had held that a commissioner's finding of probable cause must be upheld unless it is clearly arbitrary. 15 F.2d at 646. The *Brunett* court followed the *Gracie* ruling even though the challenges in *Brunett* were brought on grounds different from those employed in *Gracie.* In *Gracie* the affidavit was challenged on the basis that information contained in it was obtained when the affiant was illegally on defendant's property, rather than on the basis of an alleged falsity. *Id.* at 645.

[33] 53 F.2d at 225. The rule in *Brunett,* that no challenge may be made to the finding

the United States Suppeme Court considered the propriety of veracity challenges in *Rugendorf v. United States,*[34] but no definite ruling on the issue was made. In *Rugendorf,* the petitioner had moved to suppress evidence on the ground that the search warrant lacked probable cause because of an alleged misstatement in the affidavit.[35] Assuming, arguendo, that such a challenge could be made, the Court held the *Rugendorf* warrant to be valid[36] since the factual misstatements relied upon were not relevant to the finding of probable cause.[37]

Following *Rugendorf,* veracity challenges received much attention from legal scholars because various courts decided the question differently.[38] Several state courts retained the *Brunett* rule,[39] while others allowed challenges.[40] Two

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of probable cause based on the truthfulness of an affidavit, was followed in subsequent federal cases until 1960. *See, e.g,* Kenny v. United States, 157 F.2d 442, 442 (D.C. Cir. 1946) (if the magistrate concludes probable cause, the court cannot review on basis of factual falsity); United States v. Gianaris, 25 F.R.D. 194, 195 (D.D.C. 1960) (evidence to controvert alleged facts in warrant not admissible); United States v. Doe, 19 F.R.D. 1, 4 (E.D. Tenn. 1956) (United States Commissioner does not have to make an investigation of truthfulness).

[34] 376 U.S. 528 (1964).

[35] *Id.* at 529. The petitioner was convicted, after furs found in the search were admitted into evidence, of receiving stolen furs. *Id.* The affidavit stated that the petitioner was in the meat market business with his brother when, in fact, they had severed all business relations some years earlier. *Id.* at 532.

[36] *Id.* at 532-33.

[37] *Id.* Clark, J., writing for the majority, stated that the warrant was valid because the factual inaccuracies which the petitioner had relied upon to defeat probable cause were "only of peripheral relevancy to the showing of probable cause and did not go to the integrity of the affidavit." *Id.* at 532; *accord,* United States v. Damitz, 495 F.2d 50, 55 (9th Cir. 1974) (if the true facts constitute probable cause, the warrant is upheld); Lee v. State, 239 Ga. 769, 238 S.E.2d 852, 856 (1977) (alleged misstatements did not affect probable cause).

[38] *See generally* Herman, *Warrants for Arrest on Search: Impeaching the Allegations of a Facially Sufficient Affidavit,* 36 OHIO ST. L.J. 721 (1975); Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence,* 84 HARV. L. REV. 825 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants; Piercing the Presumption of Validity,* 44 CONN. B.J. 9 (1970).

[39] See note 33 *supra.*

[40] Because of the large number of state cases, a full review of them is beyond the scope of this note. There are, however, four general categories into which the state cases on this issue fall:

(1) Permitting veracity challenges, *e.g.,* McConnel v. State, 289 Ala. App. 744, 266 So. 2d 328, 332-33 (Ala. Crim. App.) (accused must always have the opportunity to prove falsity of a facially sufficient affidavit and thereby show actual basis of warrant), *cert. denied,* 266 So. 2d 334 (1972).

(2) Permitting, but dictated by statute, *e.g.,* People v. Alfinito, 16 N.Y.2d 181, 264 N.Y.S.2d 243, 211 N.E.2d 644, 646 (1965) (N.Y. CODE CRIM. PROC. § 813-c construed to allow inquiries into statements in the affidavit on a motion to suppress).

(3) States which never actually reached a decision but disposed of veracity challenges on grounds of immaterial misstatements, *e.g.,* Birge v. State, 143 Ga. App. 632,

years after *Rugendorf*, the District Court for the Southern District of New York held in *United States v. Halsey*[41] that under certain circumstances, hearings on the veracity of affidavits should be afforded defendants.[42] Under *Halsey*, if the defendant could make an initial showing of the potential error he desired to expose, he was then entitled to a veracity hearing.[43]

The hearing requirement was applied in 1973 in *United States v. Carmichael*,[44] the leading federal appellate court case dealing specifically with veracity challenges. In *Carmichael*, the Seventh Circuit held that a defendant is entitled to a hearing on the truthfulness of a facially sufficient affidavit when the affiant's belief in the reliability of the information is called into question.[45] The court required, however, that, to be granted such a hearing, the defendant must make an initial showing[46] of either a misrepresentation of a material fact[47]

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239 S.E.2d 395, 397 (1977) (alleged misstatement was not such a material one as would invalidate the warrant).

(4) Strictly prohibiting challenges, *e.g.*, Wood v. State, 322 So. 2d 462, 465 (Miss. 1975) (an affadavit may be challenged on its face, but no challenge is allowed on the truthfulness of the facts alleged and passed upon by the magistrate); Caslin v. Commonwealth, 491 S.W.2d 832, 834 (Ky. 1973) (it is not proper to go behind allegations of the affidavit). *See also* Comment, *supra* note 22, at 844 nn.92-95.

[41] 257 F. Supp. 1002 (S.D.N.Y. 1966).

[42] *Id.* at 1005. The court reviewed the prior cases on the subject of veracity challenges and found the law on the subject confused. *Id.* The older cases, see note 33 *supra*, had developed a split in authority by 1960, when United States v. Pearce, 275 F.2d 318 (7th Cir. 1960), and King v. United States, 282 F.2d 398 (4th Cir. 1960), had both implied that hearings were available on asserted falsity. 275 F.2d at 321-22; 282 F.2d at 400.

[43] 257 F. Supp. at 1005; *accord,* United States v. Lee, 540 F.2d 1205, 1207 (4th Cir.) (initial showing of reckless or intentional falsity in the affidavit required), *cert. denied*, 429 U.S. 894 (1976); United States v. Dunnings, 425 F.2d 836, 840 (2d Cir. 1969) (initial showing of falsehood required), *cert. denied,* 397 U.S. 1002 (1970). The *Halsey* court concluded that there should not be a "de novo" trial of each magistrate's determination in each trial and that the benefits of allowing hearings should be considered as possible burdens on the court system. 257 F. Supp. at 1005. *See* Comment, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False,* 19 U.C.L.A. L. Rev. 96, 120-23 (hearings on affidavits will not overly burden the courts).

[44] 489 F.2d 983 (7th Cir. 1973) (en banc). The defendant had been convicted on two counts of possession of stolen checks on the basis of an arrest warrant containing questionable allegations. *Id.* at 985.

[45] *Id.* at 987. *Carmichael* involved an arrest warrant affidavit. However, in Giordenello v. United States, 357 U.S. 480 (1958), the Supreme Court held that the procedure for challenging a search warrant should be the same as that for challenging an arrest warrant since both must contain a showing of probable cause under the fourth amendment. *Id.* at 485-86.

[46] The issue of hearings for persons claiming fourth amendment violations has received a considerable amount of attention in recent cases, particularly those involving federal habeas corpus. *Compare* United States *ex. rel* Petillo v. New Jersey, 400 F. Supp. 1152, 1157 (D.N.J. 1975) (prisoners who were not given a fair, full hearing on their fourth amendment challenges at trial were denied due process) *with* Stone v. Powell, 428 U.S. 465, 494 (1976) (if prisoner was afforded full, fair opportunity to litigate his claim in state court, he will not be allowed to use the fourth amendment in habeas corpus proceedings).

or an intentional misrepresentation, whether or not material.[48]

Additionally, *Carmichael* set a different requirement for the suppression of evidence. The court held that, to have evidence suppressed, the defendant must show reckless or intentional misstatements on the part of the affiant. If merely reckless, the misstatement also had to be material; if intentional, no showing of materiality was necessary.[49] The *Carmichael* ruling did not allow suppression for merely negligent or innocent misstatements.[50]

Several other circuits approached the issue somewhat differently. The Fifth Circuit, in *United States v. Thomas,*[51] considered a motion to suppress evidence[52] on the ground that the wrong name appeared in the affidavit.[53] The lower court had admitted the evidence, finding that the name was not material and the mistake was made in good faith.[54] In affirming, the Fifth Circuit held that affidavits with misrepresentations would be invalid if the error was (1) committed with the intent to deceive the magistrate, regardless of whether the error was material to the probable cause, or (2) made unintentionally, but the erroneous statement was material to the establishment of probable cause.[55] *Thomas* and

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See note 42 and accompanying text *supra*. It appears that, to avoid "fishing expeditions," some initial showing by the defendant must always be made prior to a challenge of an affidavit. State v. Melson, 284 So. 2d 873, 877 (La. 1973) (Summer, J., dissenting) (there must be real proof of falsehood by defendant before he is allowed to challenge). See cases cited in note 43 *supra*.

[47] In *Carmichael*, materiality depended upon whether the alleged misstatement, when omitted from the affidavit, would cause the affidavit to be wholly lacking in probable cause. 489 F.2d at 988-89. *See also* United States v. Harwood, 470 F.2d 322, 325 (10th Cir. 1972) (if incorrect statements are eliminated and the remaining words do not constitute probable cause, the warrant must be invalidated); note 56 *infra*.

[48] 489 F.2d at 988; *accord,* United States v. Luna, 525 F.2d 4, 8 (6th Cir. 1975) (fraud on the judicial process and false, reckless statements made to gain probable cause for a warrant necessitate suppression of evidence), *cert. denied,* 424 U.S. 965 (1976); United States v. Marihart, 492 F.2d 877, 900 (8th Cir.) (conviction of felons with firearms affirmed, adopting *Carmichael* standards as to warrants issued on probable cause from information of informant about illegal burglars), *cert. denied,* 419 U.S. 827 (1974).

[49] 489 F.2d at 989. Upon a showing of intention, the evidence would be suppressed regardless of materiality. The court stated that if the affidavit implies perjury, the fullest sanctions of the exclusionary rule should be applied to such serious and deliberate wrongdoings. *Id; see* Sevilla, *supra* note 13, at 869.

[50] 489 F.2d at 989.

[51] 489 F.2d 664 (5th Cir. 1974).

[52] In *Thomas,* the defendant's conviction for violation of narcotics laws rested upon a substantial amount of heroin found in his room by the authorities. *Id.* at 666.

[53] *Id.* The defendant's name was Titus Thomas, alias "Tee," but the affidavit for the search warrant had the name of James Finley on it, the name in which Tee's car was registered. *Id.*

[54] *Id.* at 667. The officer who received the warrant had depended on informant's information. The authorities did not know the defendant's name, so the officer traced his car registration in Alabama. The court found that the officer had made a reasonable effort to obtain the name of the defendant and therefore had made the mistake in good faith. *Id.* at 665-67.

[55] *Id.* at 669. The *Thomas* court made no distinction among the types of unintentional

Carmichael used the same standard for materiality;[56] however, *Thomas* required suppression if innocent, material misstatements were made, while under *Carmichael,* evidence would be suppressed only if obtained on the basis of reckless material misstatements.[57] In the same year that *Thomas* was decided, the First Circuit decided an important case on the same issue, *United States v. Belcufine.*[58] In *Belcufine,* the defendant, claiming that an affidavit for a search warrant contained false statements,[59] was denied a motion to suppress evidence obtained under the search warrant.[60] The *Belcufine* court reversed, ruling that a hearing must be granted a defendant who has made a preliminary showing that an affidavit contains knowing misstatements.[61] The court further held that evidence obtained under a warrant containing an intentional, relevant or nontrivial misstatement must be suppressed.[62] The *Belcufine* standard for materiality was different from that in *Thomas* and *Carmichael,*[63] and appeared to be more lenient since it included relevant and nontrivial misstatements as grounds for a veracity hearing.[64] The final burden under *Belcufine,* however, seems to have been more strict than that under *Carmichael* and *Thomas,* since the defendant had to prove an intentional misstatement to gain both a hearing and suppression, while negligent or innocent misstatements were never grounds for

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misstatements (reckless, negligent, or innocent) that were necessary to invalidate a warrant. *Id.* at 671 n.5.

[56] The standard involved deleting the erroneous or misrepresentative parts and if, after the deletion, there remained no basis for probable cause, the misrepresentation was material. The standard was formulated in three Fifth Circuit cases. *See* United States v. Morris, 477 F.2d 657, 659-62 (5th Cir.) (search warrant based on an erroneous statement in the affidavit does not cause suppression of additional criminal evidence found in plain view of searching officers), *cert. denied,* 414 U.S. 852 (1973); United States v. Jones, 475 F.2d 723, 725-27 (5th Cir.) (search warrant issued on witness' identification held invalid when evidence showed the defendant could not be identified), *cert. denied,* 414 U.S. 841 (1973); United States v. Upshaw, 448 F.2d 1218, 1218-21 (5th Cir. 1971) (when stripped of its erroneous statements, affidavit showed only a belief or suspicion of the alleged activities, which is not enough to affirm a conviction, *cert. denied,* 405 U.S. 934 (1972).

[57] See text accompanying note 50 *supra.*

[58] 508 F.2d 58 (1st Cir. 1974).

[59] *Id.* at 59-60. After his residence had been searched under the questionable warrant, the defendant had been convicted of mailing a homemade bomb. The affidavit for the warrant stated that postal inspectors had seen a wooden bench and table in defendant's workshop. The defendant had offered to prove that they could not have seen the bench and table from the window as was claimed. *Id.* at 62 n.7.

[60] *Id.* In denying the motion the district court held that it could not look beyond the "4 corners" of the affidavit. *Id.* at 60 n.1. See cases denying challenges to veracity, cited in notes 33 & 40 *supra.*

[61] 508 F.2d at 63. See notes 42, 43 & 47 and accompanying text *supra,* on the issues of hearings and initial showings.

[62] 508 F.2d at 63.

[63] See notes 49 & 56 *supra* for a discussion of the standard of materiality.

[64] 508 F.2d at 63. The statements considered material included those that might tend to influence the magistrate or to "round out the picture," not just those essential to probable cause. *Id.*

either.[65] Because of the varying views of the circuits, two Justices of the United States Supreme Court had as early as 1972 called for a definitive ruling on the issue of veracity challenges.[66]

In the instant case, the Court held that since a "flat ban" on veracity challenges leaves a defendant without recourse against an intentionally false affidavit, and since a magistrate's hearing is an ex parte proceeding which will not always uncover false statements,[67] the Delaware court should have granted the petitioner a hearing on the veracity of the statements in the affidavit.[68] The Court further reasoned that alternative sanctions, such as disciplinary proceedings against police officers, are inadequate to protect the rights of the accused.[69] The Court required, however, that, to be granted a veracity hearing, the defendant must make a substantial preliminary showing of intentionally or recklessly made false statements necessary to the establishment of probable cause.[70] Be-

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[65] On negligent or innocent misstatements as grounds for suppression, see *Thomas, supra* note 55, and text at note 57 *supra*. Speaking for the *Belcufine* court, Coffin, C.J., stated: "We find perplexing the question of the prophylactic value of the exclusion of evidence secured with a warrant issued in reliance on negligent and material, but not intentional misstatements. . . . [W]e imply no views as to the answer." 508 F.2d at 61-62.

[66] North Carolina v. Wrenn, 417 U.S. 973, 976 (1974) *denying cert. to* 486 F.2d 1399 (4th Cir. 1973) (White, J., and Burger, C.J., dissenting) (quoting Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 833 (1971) (the unsettled state of the question has brought requests for a definite ruling by the Supreme Court)).

[67] 98 S.Ct. at 2683. In response to the state's arguments that fourth amendment rights were protected by the magistrate's conclusion, the Court recognized that the procedure for issuance of the warrant must be ex parte so the suspect will not be tipped off. But the Court concluded that such a proceeding does not offer any real protection for a criminal defendant because the magistrate is being confronted for the first time with the information in the affidavit, the warrant is often needed quickly, and the magistrate cannot examine the affiant or other witnesses to determine the truthfulness of the statements in the affidavit. *Id. But see* United States v. Doe, 19 F.R.D. 1,4 (E.D. Tenn. 1956) (magistrate is not required to investigate falsity but the affidavit still cannot be challenged).

[68] 98 S.Ct. at 2685.

[69] *Id.* at 2683-84. The Court held that the alternative sanctions of perjury prosecutions, discipline, contempt, or civil suits do not sufficiently protect the defendant against police perjury. *Id.* The problem of police perjury is discussed in some depth in the exclusionary rule cases cited in note 14 *supra*. *See generally* Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L. REV. 405.

[70] 98 S.Ct. at 2685. Mr. Justice Blackmun, writing for the Court, noted that the ruling in the instant case would not require a hearing every time the statements in an affidavit are challenged. The requirement of showing intentional or reckless falsities precludes challenges where the defendant is simply attempting to cross examine, and satisfies the state's argument that a rule allowing veracity challenges would unnecessarily burden already overloaded court systems. *Id.* The limitations are such that the challenger will be forced, as in the instant case, to provide testimony or affidavits by reliable witnesses, specifically showing the portion of the affidavit claimed to be false before he will be allowed a hearing. The Court concluded that requiring substantial initial showings will

cause the defendant had been denied an opportunity to present testimony, the Court did not rule on whether his challenge would have been successful. Nevertheless, the Court concluded that if the defendant could establish by a preponderance of the evidence that the statements were false, and if the affidavit without the false statements would lack probable cause, the warrant would be quashed and the evidence obtained under it excluded.[71] A dissent by Mr. Justice Rehnquist, joined by Mr. Chief Justice Burger, argued that the availability of a hearing for impeachment of an affidavit was unnecessary for the protection of fourth amendment rights in light of other constitutional safeguards and the possibility of an increased burden on the court system.[72]

The Supreme Court has, in the instant case, definitively ruled on an issue that has been a source of confusion for many years.[73] On its face, the decision appears to be a major expansion of fourth amendment rights of the criminally accused. This appearance is deceiving, however, for the restrictions placed by the instant decision upon the availability of veracity hearings are actually very stringent. By requiring proof of intentionally or recklessly made false statements,[74] the Court has adopted for hearings virtually the same requirements that *Carmichael* had adopted for suppression of evidence.[75] Thus, under *Franks*, the initial burden of the accused is greater than that outlined in *Carmichael*, which allowed a veracity hearing merely upon a showing of a material misstatement.[76]

Perhaps the impact of *Franks* will be most dramatically felt in the Fifth Circuit. Under *Thomas*, the Fifth Circuit had previously allowed suppression of evidence where unintentional misstatements material to the finding of probable

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ensure that the opportunity for a hearing will not be abused. *Id.* at 2684. On initial showings, see note 43 and accompanying text *supra*.

[71] 98 S.Ct. at 2685; *see* Note, *Search Warrant Affidavits—The Constitutional Constraints*, 23 DRAKE L. REV. 623, 635 (1974) (if deletion of misstatement would render affidavit insufficient, the defendant may argue that no probable cause existed at the time the warrant was issued). The Court in the instant case appears to follow both the *Carmichael*, see note 45 *supra*, and *Belcufine*, see note 58 *supra*, views of suppression; however, the ruling is specifically limited to reckless or deliberate mistakes which are material to probable cause. 98 S.Ct. at 2685. United States v. Thomas, 489 F.2d 664, 671 (5th Cir. 1974), allowed suppression for nonintentional, material mistakes. Therefore, the instant ruling does not follow *Thomas*.

[72] 98 S.Ct. at 2689 (Rehnquist, J., dissenting). The dissent argued that the initial showing requirement would not preclude abuses by defendants on the already crowded court system. Mr. Justice Rehnquist concluded that since more opportunities for challenge would be afforded, and since attorneys always find ways around limitations, this ruling would increase litigation and place an unnecessarily heavy burden on the court system. *Id.* at 2691-92. Furthermore, Mr. Justice Rehnquist noted that an affidavit has no bearing on the innocence of the accused party. *Id.* at 2690.

[73] See note 66 and accompanying text *supra*.

[74] 98 S.Ct. at 2685.

[75] See notes 50 & 51 and accompanying text *supra*. *Carmichael* required a showing of intentional or reckless falsehood at the hearing in order to allow suppression.

[76] See note 47 and accompanying text *supra*.

cause were made in the affidavit.[77] *Franks,* on the other hand, precludes veracity challenges based on negligent or innocent misstatements altogether.[78]

The instant ruling will definitely affect those jurisdictions, such as Mississippi,[79] that have in the past denied the defendant an opportunity to make a veracity challenge regardless of the circumstances. Obviously, Mississippi law will require some revision to conform with the Supreme Court's prohibition of "flat bans" on veracity challenges. In some respects, such a change will undoubtedly prove to be beneficial to Mississippi. The major improvements will be in the area of police perjury.[80] No longer will police in "flat ban" states be allowed to fabricate elements of probable cause, obtain a warrant from a magistrate, and then relax, assured of insulation from probing veracity inquiries. If overzealous law enforcement officers are allowed to make false or reckless statements in affidavits without being questioned, citizens will never be secure. As a remedy for such perjury by police officers, the instant holding requires application of the exclusionary rule if the defendant sustains his preliminary showing by a preponderance of the evidence.[81]

It is possible, as Mr. Justice Rehnquist contends in his dissent, that increased litigation will occur because of the allowance of this additional form of challenge to search warrants;[82] however, if the substantial preliminary showing is required, it is probable that claims which really have no basis will "wash out at an early stage."[83] The Court in the instant decision has attempted to bring the various decisions on the issue of veracity hearings together in a uniform ruling. It is hoped that all federal and state courts will realize the importance of allowing these challenges and the policy behind them as expressed in this Supreme Court ruling.

Trudy Lumpkin

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[77] See text accompanying note 57 *supra.*

[78] 98 S.Ct. at 2685; see note 73 *supra.* It should also be noted that, while the standard in the instant case concerning the intent of the affiant appears to resemble the *Belcufine* standard, see note 65 and accompanying text *supra,* the standard of materiality in *Franks* appears to be the same as that used in *Carmichael* and *Thomas,* see note 56 *supra.*

[79] See note 40(4) *supra.* Mississippi has strictly prohibited a defendant from going behind the allegations in an affidavit to challenge veracity. Wood v. State, 322 So. 2d 462, 465 (Miss. 1975); *see* O'Bean v. State, 184 So. 2d 635, 637 (Miss. 1966); Goss v. State, 187 Miss. 72, 73, 192 So. 494, 495 (1939); Johnson v. City of Aberdeen, 179 Miss. 526, 527, 176 So. 262, 263 (1937); Sykes v. State, 157 Miss. 600, 601, 128 So. 753, 754 (1930) ("[T]he judicial finding of the officer issuing a search warrant . . . is conclusive, and cannot be inquired into.").

[80] *See generally* Grano, *supra* note 69; Sevilla, *supra* note 13.

[81] 98 S.Ct. at 2677.

[82] See note 74 *supra.*

[83] 98 S.Ct. at 2684. The Court stated that since this was the case there would be no need for new large scale commitment of judicial resources because unfounded claims could not pass the initial showing requirement. *Id.*

FEDERAL JURISDICTION—CLASS ACTIONS—ORDERS RELATING TO CLASS CERTIFICATION NOT APPEALABLE UNDER 28 U.S.C. § 1291 PRIOR TO FINAL JUDGMENT

Respondents brought an action[1] in the United States District Court for the Eastern District of Missouri against Coopers & Lybrand and other defendants[2] seeking damages resulting from respondents' purchase of securities.[3] The district court certified the action as a class action pursuant to Federal Rule of Civil Procedure 23[4] but, after further proceedings, decertified the class.[5] On appeal to the United States Court of Appeals for the Eighth Circuit, respondents contended that since it would not be economically feasible to pursue their claims individually,[6] the order decertifying the class was a final decision under 28 U.S.C. § 1291.[7] Coopers & Lybrand alleged that the decertification order was not a final decision, and therefore the court of appeals had no jurisdiction to hear the case.[8] The Eighth Circuit adopted the respondents' contention, assumed jurisdiction to hear the appeal on the merits, and reversed the order decertifying the class.[9] On writ of certiorari the United States Supreme Court, *held*, reversed. An order regarding certification of a class is not appealable under 28

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[1] Respondents alleged violations of §§ 11, 12(2) and 17(b) of the Securities Act of 1933, 15 U.S.C. §§ 77K, 771(2) & 77q(a) (1976), and § 10(b) of the Securities Exchange Act of 1934, *id.* § 78j(b). Coopers & Lybrand v. Livesay, 98 S. Ct. 2454, 2456 n.4 (1978).

[2] The original defendants were Punta Gorda Isles, Inc., certain officers and directors of Punta Gorda Isles, Inc., and Coopers & Lybrand accounting firm. 98 S. Ct. at 2456 n.3.

[3] Respondents purchased $5,000 of debentures and 100 shares of common stock issued by Punta Gorda Isles, Inc., a Florida land development corporation. The securities were issued at a 1972 public offering for an aggregate price in excess of eighteen million dollars. Coopers & Lybrand had certified the financial statements in the registration statement and prospectus issued in connection with the offering. In a subsequent annual report to stockholders, the financial statements were restated, with the earnings reported for the years 1970 and 1971 overstated by more than two million dollars. The respondents then sold the securities, sustaining a loss of $2,650. The complaint alleged: (1) failure to disclose that new rules of the American Institute of Certified Public Accountants would require the restatement of earnings for the years 1967-1972, (2) failure to disclose that earnings consisted of installment sales contracts, (3) misleading statement of the ratio of earnings to fixed charges, and (4) failure to disclose adverse effect of certain Florida ecological regulations. Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106, 1107 n.1 (8th Cir. 1977), *rev'd*, 98 S. Ct. 2454 (1978).

[4] FED. R. CIV. P. 23(c)(1), *as amended*, Feb. 28, 1966, provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

[5] 550 F.2d at 1108-09. The district court's opinion was not reported.

[6] Respondents alleged that it was not economically feasible to pursue their individual claim of $2,650 unless the class action was certified. *Id.* at 1110.

[7] 28 U.S.C. § 1291 (1976) provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

[8] 550 F.2d at 1109.

[9] *Id.* at 1112. The respondents also petitioned for a writ of mandamus directing the district court to recertify the class. Having assumed jurisdiction, the Eighth Circuit dismissed the petition. *Id.* at 1113.

U.S.C. § 1291 prior to final judgment. *Coopers & Lybrand v. Livesay*, 98 S. Ct. 2454 (1978).

The United States Supreme Court has held that there is no right to a judgment from more than one court;[10] however, the American system of justice does provide for appellate review of a lower court judgment. Provisions for the timing of appeals require consideration of the cost and inconvenience of review in terms of efficiency and the possibility of denying justice by delay.[11] One approach would allow review only upon a final disposition of the case by the trial court,[12] while another would allow appellate consideration of each issue in a case as it arises.[13] The English common law courts adopted the former approach, requiring that there be a final disposition of a controversy before a writ of error would lie.[14] This final judgment rule was included in the Judiciary Act of 1789,[15] which established the United States' federal court system, and was carried over in the Act of March 3, 1891,[16] which created the circuit courts of appeals. The final judgment rule is presently embodied in 28 U.S.C. § 1291.[17]

Formulating a precise definition of finality has proven difficult for the courts.[18] The most frequently cited definition states that a final decision is one

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[10] Cobbledick v. United States, 309 U.S. 323, 325 (1940).

[11] Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

[12] This is the approach taken, with a few exceptions, in the United States. *See, e.g.*, 28 U.S.C. § 1257 (1976) (providing review of "final judgments or decrees" rendered by state courts); *id.* § 1291 (providing review of "final decisions" rendered by district courts). The Supreme Court has viewed as identical the requirement of finality embodied in these statutes. Therefore, for this purpose, the cases decided under these statutes are cited interchangeably. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 510 (3d ed. 1976).

[13] There are a few statutory exceptions to the "final judgment" rule in the United States. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (1976) (allowing appeal from interlocutory orders dealing with injunctive relief); *id.* § 1292(b) (allowing certification of interlocutory orders by the district court); *id.* § 1651 (allowing writs of mandamus); FED. R. CIV. P. 54(b) (allowing the district court to certify an order as final).

[14] *See* Metcalfe's Case, 77 Eng. Rep. 1193, 1196 (K.B. 1615); Holcombe v. McKusick, 61 U.S. (20 How.) 552, 554 (1857). *See generally* Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539 (1932).

[15] Judiciary Act of 1789, § 22, 1 Stat. 73, 84. In contrast to English practice, where review of interlocutory decrees was permitted under equity procedure, this act adopted the final judgment rule for both law and equity courts. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 101-05 (1923).

[16] Act of March 3, 1891, 26 Stat. 826. Section 5 of the act provided for appeals directly to the Supreme Court in cases in which the jurisdiction of the court was in issue, but did not place limitations on when an appeal could be taken. The Supreme Court, however, was quick to construe the act as requiring a final judgment. McLish v. Roff, 141 U.S. 661, 665-66 (1891).

[17] See note 7 *supra*.

[18] The Supreme Court has stated that it cannot devise a general rule. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950). Most of the cases have viewed the concept of finality as an aspect of judicial administration rather than a technical definition of appellate jurisdiction. *See* Crick, *supra* note 14, at 558 ("We are really seeking to determine whether this is the sort of decision which the appellate court wants to hear, but we spend our time arguing the question of whether the decision was a final judgment.").

that terminates the litigation and leaves nothing to be done but to execute the judgment.[19] Courts have repeatedly been called upon to determine whether an order is a final decision,[20] and have concluded at times that literal adherence to a technical definition of finality would conflict with the purpose of section 1291.[21]

The Supreme Court first introduced flexibility into the rule of finality in *Forgay v. Conrad.*[22] That case involved an appeal from a decree ordering a defendant to convey property to an assignee in bankruptcy for immediate execution, while awaiting an outstanding reference to a master for an accounting.[23] The Court, using a liberal construction of finality,[24] held that orders which subject a party to irreparable injury are final for purposes of review.[25] The *Forgay* exception has been used to allow appeal from orders requiring delivery of title to a canal,[26] setting aside a radio station lease,[27] and directing conveyance of a part interest in an oil and gas lease.[28] Subsequent attempts to extend the *Forgay* exception beyond its narrow scope have, however, been rejected.[29]

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[19] Catlin v. United States, 324 U.S. 229, 233 (1945) (denied an appeal from a district court order which directed condemnation of land but left open the amount of compensation to be awarded).

[20] Sunderland, *The Problem of Appellate Review,* 5 TEX. L. REV. 126, 127 (1927).

> There is one thing to be said in favor of no restrictions at all—it will save an immense amount of useless litigation over the question whether parties may or may not appeal particular cases. Every restriction to ward off appeals creates litigation over the force and effect of the restriction itself. Machinery to save labor may become so complex as to waste more labor than it saves.

Id.

[21] *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) (endorsing a pragmatic approach to the question of finality); Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949) (advocating a practical rather than a technical construction of finality).

[22] 47 U.S. (6 How.) 201 (1848). *See generally* 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.11, at 137-50 (2d ed. 1975).

[23] 47 U.S. at 202-03.

[24] *Id.* at 203; *cf.* Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966) (advocating a "practical" construction of finality), *cert. denied,* 386 U.S. 1035 (1967).

[25] 47 U.S. at 201, 204; *accord,* Radio Station WOW v. Johnson, 326 U.S. 120, 130 (1945) (order directing transfer of a radio station lease while awaiting an accounting of profits held final); Carondolet Canal Co. v. Louisiana, 233 U.S. 362, 388 (1914) (order requiring delivery of title to a canal while awaiting an accounting held final). Subsequent cases have, however, admitted that such orders are in reality interlocutory. *See, e.g.,* Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 (1948); Craighead v. Wilson, 59 U.S. (18 How.) 199, 202 (1855). *See also* Barnard v. Givson, 48 U.S. (7 How.) 650, 658 (1849) (order enjoining defendant from using machines which allegedly infringed upon plaintiff's patent was not final); Perkins v. Fourniquet, 47 U.S. (6 How.) 206, 209 (1848) (decree adjudicating rights in property subject to revision was not final).

[26] Carondolet Canal Co. v. Louisiana, 233 U.S. 362 (1914).

[27] Radio Station WOW v. Johnson, 326 U.S. 120 (1945).

[28] Kasishke v. Baker, 144 F.2d 384 (10th Cir. 1944), *cert. denied,* 325 U.S. 856 (1945).

[29] *See, e.g.,* Cobbledick v. United States, 309 U.S. 323, 324 (1940) (order denying a

The theory of severability of issues was the basis for the more important collateral order exception created in *Cohen v. Beneficial Loan Corp.*[30] The district court had refused to require the plaintiff in a shareholder's derivative suit to post a security bond as required by state law.[31] In holding the order appealable, the Supreme Court gave section 1291 a practical rather than technical construction.[32] The Court announced three criteria which, if met, fulfill the section 1291 requirement of finality. First, the issue appealed must be conclusively determined by the district court.[33] Second, the issue must not be involved with the merits of the claim.[34] Third, effective review of the decision must be jeopardized by a delay of appeal until a final judgment is rendered.[35] These

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motion to quash subpoenas was not final since it could be reviewed after a finding of contempt); Taylor v. Board of Educ., 288 F.2d 600, 603 (2d Cir.) (order directing submission of school desegregation plan not a final order under "irreparable injury" rule), *cert. denied,* 368 U.S. 940 (1961); King v. California Co., 224 F.2d 193, 196 (5th Cir. 1955) (dismissal of damage claim for certain years not a final order), *cert. denied,* 352 U.S. 1007 (1957). *But see* Radio Station WOW v. Johnson, 326 U.S. 120, 122 (1945) (state court order directing delivery of a radio station lease while awaiting an accounting of profits held final).

[30] 337 U.S. 541 (1949).

[31] *Id.* at 544-45. The New Jersey statute required that plaintiffs in "strike suits" owning less than a five percent interest in the corporation post bond to indemnify the corporation for expenses of defending, if the corporation prevailed. *Id.*

[32] *Id.* at 546.

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. (citations omitted).

[33] *Id.* The Court noted that district court orders involving only discretion as to the amount of security, a matter subject to reconsideration, presented a different question. *Id.* at 547; *see In re* Cessna Aircraft Distributorship Antitrust Litigation, 518 F.2d 213, 215-16 (8th Cir.) (order granting class action status considered conditional), *cert. denied,* 423 U.S. 947 (1975); Gerstle v. Continental Airlines, Inc., 466 F.2d 1374, 1377 (10th Cir. 1972) (order decertifying class subject to reconsideration of trial court); Hovarth v. Letay, 343 F.2d 463, 464-65 (2d Cir. 1965) (refusal to compel examination of nonparty subject to reconsideration after recovery of judgment).

[34] 337 U.S. at 546; *see* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963) (order denying change of venue not "enmeshed in the factual and legal issues comprising the plaintiff's cause of action"). *But cf.* Share v. Air Properties G. Inc., 538 F.2d 279, 284 (9th Cir.) (order denying class action status turned on issues not separable from the merits), *cert. denied,* 429 U.S. 923 (1976); General Motors Corp. v. City of New York, 501 F.2d 639, 645 (2d Cir. 1974) (order granting class action status not separable from the merits).

[35] 337 U.S. at 546; *cf.* Parr v. United States, 351 U.S. 513, 519-20 (1956) (order dismissing indictment and transferring case subject to review upon final judgment); Williams v. Mumford, 511 F.2d 363, 366-67 (D.C. Cir.) (decertification of class open to review after final judgment with respect to named plaintiffs), *cert. denied,* 423 U.S. 828 (1975). For a recent case in this line see United Airlines, Inc. v. McDonald, 432 U.S. 385, 391-96

criteria were expanded in *Dickinson v. Petroleum Conversion Corp.*,[36] where the Court held that a party who fails to appeal from an order that is final under the collateral order criteria forfeits its right to appeal.[37]

In a sharp departure from previous rulings, the Supreme Court approved the appeal of an interlocutory order dismissing a pendent state claim in *Gillespie v. United States Steel Corp.*[38] The decision to allow the appeal was based on four grounds: (1) it was more economical to rule on the case since the

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(1977) (refusal to certify class is subject to review after final judgment at behest of named plaintiff *or* intervening class members).

An order vacating an attachment in admiralty was held to fall within the collateral order exception in Swift & Co. v. Compania Columbiana Del Caribe, 339 U.S. 684 (1949). The Court concluded that review of the order at a later date would be an "empty rite." *Id.* at 689. When an attachment is upheld, however, the order is construed as interlocutory. Cushing v. Laird, 107 U.S. 69, 76 (1882).

In Roberts v. United States Dist. Court, 339 U.S. 844 (1950), an order denying leave to proceed in forma pauperis was held final under the collateral order exception. *Id.* at 845. *Compare id. with* Lamarche v. Sunbeam Television Corp., 446 F.2d 880, 880 (5th Cir. 1971) (denial to proceed in forma pauperis and to maintain class action are not final orders) *and* Gomez v. United States, 245 F.2d 346, 347 (5th Cir. 1957) (holding orders denying leave to proceed as a pauper not final) *and* Flowers v. Turbine Support Div., 507 F.2d 1242, 1244 (5th Cir. 1975) (holding review of such orders extends to consideration of the merits).

A district court's order denying a motion to reduce bail was held final in Stack v. Boyle, 342 U.S. 1 (1951), under the theory that there was no discretion to refuse to reduce excessive bail. *Id.* at 6-7. See note 33 *supra.*

[36] 338 U.S. 507 (1950).

[37] *Id.* at 516. Furthermore, the Court stated that in determining whether to allow an appeal there must be a balancing of the considerations of the cost and convenience of piecemeal review with the danger of denying justice by delay. *Id.* at 511.

There have been numerous cases that have further shaped the collateral order exception. For example, a state agency's order requiring a gas company to take gas from a gas well ratably with another company was held not final in Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 72 (1948). The order left open several options. A closely divided Court found the case more analogous to the condemnation cases such as Catlin v. United States, 324 U.S. 229 (1945), see note 19 *supra*, than to the cases awaiting an accounting, see notes 22 through 29 and accompanying text *supra*. 334 U.S. at 69-71.

An order which directed dissolution of a merger without specifying a plan for divestiture was held final in Brown Shoe Co. v. United States, 370 U.S. 294, 304 (1962). The Court emphasized the fact that the federal issue had been conclusively determined and the disposition of the appeal would expedite the conclusion of the case, *id.* at 308, but did not specifically base its decision on either *Cohen* or *Forgay*. *Id.* at 308-09. The importance of hearing an appeal to decide a question of paramount importance to the pending issues was again stressed in Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), where an order disposing of a motion for a change of venue was held final because it did not involve the merits of the claim and, if review were delayed, the pending litigation might be tried in the wrong state court. *Id.* at 557-58.

[38] 379 U.S. 148 (1964), *noted in* 51 CORNELL L.Q. 369 (1966). The district court struck from the complaint allegations of negligence under the Ohio wrongful death statute and all reference to recovery for the benefit of the decedent's brother and sisters on the grounds that the Jones Act was the exclusive remedy. 379 U.S. at 148.

case was already before the Court;[39] (2) although the claims were not formally severable, there were two beneficial interests involved;[40] (3) the ruling was fundamental to the further conduct of the cases;[41] and (4) hearing the appeal fulfilled the purpose promoted by 28 U.S.C. § 1292(b).[42] This radical extension of the pragmatic approach[43] to appealability of interlocutory orders was so vague that the lower courts have not relied exclusively on *Gillespie* as a basis for appeal.[44]

The Second Circuit utilized both the *Cohen* and *Gillespie* doctrines in allowing an appeal from a district court order denying certification of a class[45] in *Eisen v. Carlisle & Jacquelin.*[46] The court held that when the effect of a denial of class certification would be the death knell of the action, the order is final for purposes of review.[47] This exception, known as the death knell doctrine,

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[39] 379 U.S. at 153. Justice Harlan noted, however, that this rationale would support appellate review whenever the Court granted certiorari and allowed arguments on the merits. *Id.* at 170 (Harlan, J., dissenting).

[40] *Id.* at 153. The court drew an analogy to Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). In *Dickinson,* however, the claims of the respondent corporation were formally severable. *Id.* at 508-09; *see* Redish, *The Pragmatic Approach to Appealability in the Federal Courts,* 75 COLUM. L. REV. 89, 118 (1975).

[41] 379 U.S. at 153-54 (quoting United States v. General Motors Corp., 323 U.S. 373, 377 (1945)). Justice Harlan noted that the question in that case was whether the Supreme Court should review a nonfinal order of the court of appeals, which is provided for in 28 U.S.C. § 1254(1) (1976). 379 U.S. at 168 n.2 (Harlan, J., dissenting).

[42] 379 U.S. at 154. 28 U.S.C. § 1292(b) (1976), provides for certification of interlocutory orders by the district court.

[43] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) (quoting FED. R. CIV. P. 1) ("A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action'.").

[44] Redish, *supra* note 40, at 118-19.

[45] Orders relating to class action certification have been held nonfinal under the exceptions previously discussed. See notes 4, and 33 through 35 *supra.*

[46] 370 F.2d 119 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967) *[Eisen I].* Litigation of this case lasted eight years. Plaintiff alleged antitrust violations by two major odd-lot securities dealers and the district court dismissed the class action. 370 F.2d at 119. The Second Circuit reversed the dismissal and remanded for an evidentiary hearing on the question of class status. 391 F.2d 555 (2d Cir. 1968) *[Eisen II].* The case was again appealed when the district court certified the class and the Second Circuit reversed, finding the class unmanageable. 479 F.2d 1005 (2d Cir. 1973) *[Eisen III].* The Supreme Court then heard the case on the issue of notice costs, holding these costs could not be imposed on the defendant. 417 U.S. 156, 179 (1974) *[Eisen IV].* For a complete summary of the *Eisen* case, see *Eisen IV,* 417 U.S. 156 (1974).

[47] 370 F.2d at 120-21.

> [T]he order dismissing this class action is appealable. The alternatives are to appeal now or end the lawsuit for all practical purposes. . . . We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. . . . Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed.

Id.

states in effect that when the individual plaintiff's claim is too small in relation to the cost and complexity of the litigation and the size of the potential judgment to warrant individual prosecution, the dismissal of the class action is an appealable final judgment.[48] When consideration of these factors indicates that the individual plaintiff's claim is large enough to warrant individual prosecution, the dismissal is held to be an interlocutory order.[49]

The effect of the denial of class certification on both the named plaintiff and the absent members of the potential class was considered by the court in *Eisen I*.[50] In *Korn v. Franchard Corp.*,[51] however, the Second Circuit confined its consideration to the claim of the individual plaintiff.[52] The court also set guidelines for application of the death knell doctrine, based loosely on the ten thousand dollar federal jurisdictional requirement.[53] Utilizing these guidelines, the court allowed the appeal of a plaintiff whose claim was three hundred eighty six dollars, but dismissed the appeal of a plaintiff whose claim was eight thousand five hundred dollars.[54] The use of the dollar amount guidelines in applying the death knell doctrine drew strong criticism[55] and presented problems when

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[48] *See, e.g.*, Korn v. Franchard Corp., 443 F.2d 1301, 1306 (2d Cir. 1971) (claim of $386); Green v. Wolf Corp., 406 F.2d 291, 295 (2d Cir. 1968) (claim of $1,000), *cert. denied*, 395 U.S. 977 (1969); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966) (claim of $70), *cert. denied*, 386 U.S. 1035 (1967).

[49] *See, e.g.*, Domaco Venture Capital Fund v. Teletronics Serv., Inc., 551 F.2d 508, 509 (2d Cir. 1977) (claim of $7,000); Shayne v. Madison Square Garden Corp., 491 F.2d 397, 402 (2d Cir. 1974) (claim of $7,482); Milberg v. Western Pac. R.R., 443 F.2d 1301, 1306 (2d Cir. 1971) (claim of $8,500).

[50] 370 F.2d at 120-21; *accord*, Caceres v. International Air Transp. Ass'n, 422 F.2d 141, 144 (2d Cir. 1970) (appeal dismissed where average claim of the class members was $150,000); Green v. Wolf Corp., 406 F.2d 291, 295-96 (2d Cir. 1968) (appeal allowed where plaintiff's claim was $1,000 and no member of the class had claim sufficiently large to pursue alone), *cert. denied*, 395 U.S. 977 (1969).

[51] 443 F.2d at 1301 (2d Cir. 1971).

[52] *Id.* at 1305-06; *accord*, Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1099 (2d Cir. 1974); Herbst v. ITT, 495 F.2d 1308, 1311-12 (2d Cir. 1974); *see* Note, *Appealability of a Class Action Dismissal: The "Death Knell" Doctrine*, 39 U. CHI. L. REV. 403, 413-16 (1972).

[53] 443 F.2d at 1306-07. *See also* Note, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548, 551 (1975).

[54] 443 F.2d at 1306-07.

[55] *See, e.g.*, City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 300-01 (2d Cir. 1969) (Hays, J., dissenting) (arguing that the dismissal of a class action may not induce the named plaintiff to abandon his claim, but that the claims of remaining class members would be terminated). *But cf.* United Airlines, Inc. v. McDonald, 432 U.S. 385, 391-96 (1977) (allowing appeal of adverse class determination by intervening class members); East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (plaintiff who lost for reasons not involved in the class members' claims deemed an inadequate class representative); Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (allowing collateral attack on judgment, deeming plaintiff an inadequate class representative). *See also* Korn v. Franchard Corp., 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring) (criticizing the guidelines as applicable solely on an ad hoc basis); Shayne v. Madison Square Garden Corp., 491 F.2d 397, 401 n.11 (2d Cir. 1974) (the doctrine could

the claims of the named plaintiffs were in the financial middle ground. This problem led to modification of the doctrine in the Fifth,[56] Sixth,[57] and Ninth[58] Circuits, which required that plaintiffs build a record in the trial court to support their contention that the action would be terminated. The District of Columbia, Eighth, and Tenth Circuits have accepted the death knell doctrine,[59] while the Third and Seventh Circuits have expressly rejected the doctrine.[60]

A defendant's attempt to appeal immediately an order certifying a class action presents a different question. This issue arose in *Eisen v. Carlisle & Jacquelin [Eisen III].*[61] Although the court's jurisdiction in *Eisen III* was not based on the death knell doctrine,[62] the court advocated allowing interlocutory

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lead to a plaintiff's minimizing his damages in order to obtain jurisdiction). *But see* note 58 and accompanying text *infra.*

In United Airlines, Inc. v. McDonald, 432 U.S. 385, 391-96 (1977), a member of a denied class was allowed to intervene to appeal the adverse class determination after the plaintiff had settled his claim and did not appeal. The Court held that the entry of final judgment in settlement of the plaintiff's claim made the class denial appealable. *Id.* at 394.

[56] *See* Gosa v. Securities Inv. Co., 449 F.2d 1330 (5th Cir. 1971). The court dismissed an appeal from an order dismissing the class action where plaintiff's claim was $3,222. The court said there was inadequate information in the record relating to the estimated expenses of carrying the case to completion, the solvency of the plaintiff in relation to the court costs and basic litigation expenses, the likelihood of recovery of attorneys' fees, and the potential claims of other class members. *Id.* at 1322; *accord,* Graci v. United States, 472 F.2d 124, 126 (5th Cir.) (dismissing appeal where claim was $78,700, and discussing other applicable criteria needed in the record), *cert. denied,* 412 U.S. 928 (1973).

[57] *See* Ott v. Speedwriting Pub. Co., 518 F.2d 1143, 1149 (6th Cir. 1975) (adopting Fifth Circuit position) (citing Gosa v. Securities Inv. Co., 449 F.2d 1330 (5th Cir. 1971)).

[58] *See* Share v. Air Properties G. Inc., 538 F.2d 279, 283 (9th Cir.) (requiring that the plaintiff demonstrate that no member of the class has a claim that is individually viable), *cert. denied,* 429 U.S. 923 (1976). *See also* Hooley v. Red Carpet Corp., 549 F.2d 643, 645 (9th Cir. 1977) ("[T]he plaintiff seeking class certification [must] demonstrate, and the district court find, that it is unlikely that any member of the purported class has a claim justifying separate litigation.").

[59] *See, e.g.,* Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073, 1076-77 (10th Cir. 1975) (impliedly recognizing the validity of the death knell doctrine); Williams v. Mumford, 511 F.2d 363, 367-68 (D.C. Cir.) (plaintiff in civil rights case had sufficient incentive to pursue claim individually where attorneys' fees were recoverable), *cert. denied,* 423 U.S. 828 (1975); Hartmann v. Scott, 488 F.2d 1215, 1223 (8th Cir. 1973) (order denying class action status did not act as the death knell of the action).

[60] *See* Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364, 1368-69 (7th Cir.) (restricting review of class action determinations to § 1292(b) and mandamus), *cert. denied,* 429 U.S. 907 (1976); King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973); Hackett v. General Host Corp., 455 F.2d 618, 622-23, 624 (3d Cir.) (restricting review of rule 23 class determinations to § 1292(b), rule 54(b) or mandamus, and suggesting that the provision for attorneys' fees in the Sherman Act, 15 U.S.C. § 15 (1976), would prevent the "death knell" of the action), *cert. denied,* 407 U.S. 925 (1972).

[61] 479 F.2d 1005 (2d Cir. 1973), *vacated,* 417 U.S. 156 (1974). See note 46 *supra.*

[62] The court retained jurisdiction when it remanded the case for an evidentiary hearing in *Eisen II,* 391 F.2d 555 (2d Cir. 1968). 479 F.2d at 1007.

appeals from all class determinations[63] to afford equal treatment to plaintiffs and defendants.[64] *Eisen* finally reached the Supreme Court, but the holding was confined to the issue of notice costs and did not consider the validity of the death knell doctrine.[65] The Second Circuit has permitted an appeal of an order certifying a class in only one case,[66] however, and subsequent cases have retreated from the early position.[67] In one recent case[68] the court denied an appeal from a certification order because the defendant only questioned a discretionary rule 23 ruling of the district court.[69] The concurring opinion advocated the abandonment of the death knell doctrine for appeals from both grants and denials of class status.[70] Other circuits have held that orders granting certification of classes are not appealable under section 1291.[71]

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[63] 479 F.2d at 1007 n.1. The court suggested that the order certifying the class must: (1) be fundamental to the further conduct of the case (under the theory that if the order were reversed it would be the "death knell" of the action, i.e., a "reverse death knell" doctrine), (2) be separate from the merits of the cause of action, and (3) cause irreparable harm to the defendant. *Id.*

[64] *Id.* The court cited Judge Friendly's concurring opinion in Korn v. Franchard Corp., 443 F.2d 1301, 1307 (2d Cir. 1971) (advocating "equality of treatment as between plaintiffs and defendants"). 479 F.2d at 1007 n.1.

[65] 417 U.S. 156, 172 (1974). *See* Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364, 1370 n.2 (7th Cir.) (Swygert and Bauer, JJ., dissenting) (stating that *Eisen IV* authorizes appeals of all orders of class determination because if the class orders were not appealable then there was no jurisdictional basis for *Eisen II* and *Eisen III* and the question of notice costs would never have been reached), *cert. denied,* 429 U.S. 907 (1976). *But see* Parkinson v. April Indus., Inc., 520 F.2d 650, 659 (2d Cir. 1975) (Friendly, J., concurring) (noting that although the Supreme Court did not reject the doctrine in *Eisen IV,* it did not sanction it).

[66] Herbst v. ITT, 495 F.2d 1308 (2d Cir. 1974). The plaintiff alleged violations of the securities acts and sought damages. The district court certified the class and the defendant appealed. In allowing the appeal, the court adopted the test of *Eisen III.* See note 60 *supra.* Greatest emphasis was placed on the irreparable harm element. 495 F.2d at 1312-13.

[67] *See, e.g.,* General Motors Corp. v. City of New York, 501 F.2d 639, 646-47 (2d Cir. 1974) (the *Eisen III* test was not met and the court noted that rule 23 allows reconsideration of the certifying order as the case progresses); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1099-1101 (2d Cir. 1974) *(Eisen III* test not met and defendants' appeal dismissed).

[68] Parkinson v. April Indus., Inc., 520 F.2d 650 (2d Cir. 1975).

[69] *Id.* at 658. See note 33 *supra.*

[70] 520 F.2d at 658-60 (Friendly, J., concurring). "[T]he best solution is to hold that appeals from the grant or denial of class action designation can be taken only under the procedure for interlocutory appeals provided by 28 U.S.C. § 1292(b)." *Id.* at 660.

[71] *See* Lamphere v. Brown Univ., 553 F.2d 714, 716-18 (1st Cir. 1977) (court refused to hear appeal in absence of compelling circumstances); Hellerstein v. Mr. Steak, Inc., 531 F.2d 470, 474 (10th Cir.) (order not final), *cert. denied,* 429 U.S. 823 (1976); Blackie v. Barrack, 524 F.2d 891, 895-97 (9th Cir. 1975) (order considered conditional), *cert. denied,* 429 U.S. 816 (1976); *In re* Cessna Aircraft Distributorship Antitrust Litigation, 518 F.2d 213, 215-16 (8th Cir.) (order considered conditional and thus not final), *cert. denied,* 423 U.S. 947 (1975); Katz v. Carte Blanche Corp., 496 F.2d 747, 752 (3rd Cir.)

(allowed appeal under 28 U.S.C. § 1292(b)), *cert. denied,* 419 U.S. 885 (1974); Thill Sec. Corp. v. New York Stock Exch., 469 F.2d 14, 17 (7th Cir. 1972) (order reviewable after final judgment); Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969) (class certification is a conditional order).

Interlocutory appeals from orders relating to class action designation have been allowed, in some instances, under 28 U.S.C. § 1292(b) (1976), which provides that a district judge may order an appeal on a controlling question of law to advance termination of the litigation, if the judge "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* The question of whether to allow an interlocutory appeal under § 1292(b) usually hinges on the "controlling question of law" requirement. 9 J. MOORE, B. WARD, & J. LUCAS, *supra* note 22, ¶ 110.22(2), at 260-62 (2d ed. 1975). The traditional view was that the decision to deny or grant class certification pursuant to rule 23 was discretionary and therefore did not hinge on a question of law. If the court of appeals found a satisfactory question of law and granted the appeal, the class order was also reviewable. *See* Wilcox v. Commerce Bank, 474 F.2d 336, 347 (10th Cir. 1972) (denial of class certification not abuse of discretion in action for violation of Truth in Lending Act); Johnson v. Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) (no abuse of discretion found in employment discrimination action).

A new rationale was advanced in 1974 by the Third Circuit, which held that the determining factor is whether allowing the appeal would accomplish the policies of § 1292(b), to prevent harm to the party appealing and to avoid unnecessary expense and the wasting of time. Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3rd Cir.) (credit card holder alleging violation of Truth in Lending Act for failure to disclose finance charges), *cert. denied,* 419 U.S. 885 (1974). The court concluded that a class order was appealable by itself. 496 F.2d at 756. The Third Circuit subsequently stated that it would allow an appeal from a denial of a class under § 1292(b). Samuel v. University of Pittsburgh, 506 F.2d 355, 360 (3rd Cir. 1974) (students bringing class action contending certain classifications for tuition purposes were invalid); Hackett v. General Host Corp., 455 F.2d 618, 624 (3rd Cir.) (class action by consumer for alleged violation of Sherman Act), *cert. denied,* 407 U.S. 925 (1972). *See also* Susman v. Lincoln Am. Corp., 561 F.2d 86, 87 & n.1 (7th Cir. 1977) (class action alleging violation of securities laws); Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594, 595 (4th Cir. 1976) (allowing such appeals under § 1292(b)).

The primary obstacles to appeals under § 1292(b) are that the appeal must be certified by the district judge who made the original class determination, *see, e.g.,* Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 698 (9th Cir. 1977) ("As long as the district judge is not of the opinion that the order . . . meets the criteria of 28 U.S.C. § 1292(b), it is within his power to deny the motion for certification of the appeal."), *cert. denied,* 434 U.S. 829 (1978), and that the court of appeals has total discretion in granting the appeal. *See* Note, *supra* note 53, at 561.

Appeals have also been allowed under 28 U.S.C. § 1292(a)(1) (1976), which provides for appeals from interlocutory orders dealing with injunctions. The appeal from denial of class certification had been allowed under the theory that the striking of the class action was analogous to a denial of broad injunctive relief on behalf of the class. *See, e.g.,* Jones v. Diamond, 519 F.2d 1090, 1097 (5th Cir. 1975) (prisoners bringing civil rights action to reform county jail conditions); Yaffe v. Powers, 454 F.2d 1362, 1364 (1st Cir. 1972) (action seeking injunctions on grounds that police surveillance of public meetings violated constitutional rights); Brunson v. Board of Trustees, 311 F.2d 107, 108-09 (4th Cir.) (black children bringing an action against board for alleged biracial school system), *cert. denied,* 373 U.S. 933 (1962). This avenue of appeal has been foreclosed. *See* Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 213 (3rd Cir. 1977), *aff'd,* 98 S. Ct. 2451 (1978).

In the instant case, the Court reasoned that since rule 23 specifically provides that a class determination may be altered or amended before a decision on the merits,[72] such orders do not fall within the collateral order exception to section 1291.[73] As to the death knell doctrine, the Court concluded that since the administration of the doctrine thrusts the appellate courts into the trial process and could lead to multiple appeals,[74] the resulting potential for docket congestion and trial delay outweighs any possible benefit of the doctrine.[75] Furthermore, the death knell doctrine allows unrestricted review of interlocutory orders and thereby circumvents the requirements of section 1292(b).[76] Thus, since section 1291 provides for jurisdiction of appeals only from final decisions,[77] and since a class action order does not come within a recognized exception to this rule, an order regarding certification of a class is not appealable under section 1291 prior to final judgment.[78]

The instant case will have the immediate effect of ending time-consuming and complex litigation over whether the death knell of an action has sounded in a particular case.[79] The death knell doctrine had proved in practice to be exceedingly difficult to administer, as evidenced by the conflict in the circuit

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The Court did not reach the issue of appealability when the plaintiff requests both class certification and a preliminary injunction. 98 S. Ct. at 2453 n.5. *See also* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 166 n.2 (7th Cir.) (class action brought under the 1964 Civil Rights Act alleging race and sex discrimination in employment), *cert. denied*, 429 U.S. 986 (1976).

The All Writs Act, 28 U.S.C. § 1651(a) (1976), provides for the use of mandamus, which may be available for appeal of certification orders in limited instances. The use of mandamus is confined to instances where the district court has abused its discretion in applying the criteria of rule 23. Mandamus has been described as a drastic remedy and is available only in extraordinary circumstances. *See* Kerr v. United States Dist. Court, 426 U.S. 394, 402-03 (1976) (California prisoners seeking injunctive relief for alleged constitutional violations). *See generally* 9 J. MOORE, B. WARD, & J. LUCAS, *supra* note 22, ¶ 110.26, at 275 (2d ed. 1975); Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292, 1298-99 (1970).

[72] Coopers & Lybrand v. Livesay, 98 S. Ct. 2454, 2458 (1978). See note 4 *supra*.

[73] The Court also noted that the orders are involved with the merits of the claim and are reviewable effectively after final judgment. 98 S. Ct. at 2458.

[74] *Id.* at 2461.

[75] *Id.*

[76] *Id.* See note 71 *supra*. The Court stated that these requirements ensure that review will be confined to appropriate cases and will avoid time-consuming jurisdictional determinations by the court of appeals. 98 S. Ct. at 2461.

[77] See note 7 *supra*.

[78] 98 S. Ct. at 2458. Although indicating that these were the principal vices of the death knell doctrine, see notes 74 through 77 and accompanying text *supra*, the Court indicated that the doctrine, if accepted, would also apply to other pretrial orders in nonclass action litigation. 98 S. Ct. at 2459. The Court also objected to the application of the doctrine in allowing appeals by plaintiffs and not defendants. *Id.* at 2462. See notes 61 through 70 and accompanying text *supra*. Furthermore, the Court stated that its holding in Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), was restricted to its facts. 98 S. Ct. at 2462 n.30. See notes 38 through 44 and accompany text *supra*.

[79] *Cf.* note 20 *supra*.

courts over its acceptance and the varying methods of its application.[80] In conjunction with the Supreme Court's decision in *Gardner v. Westinghouse Broadcasting Co.*,[81] which held that orders denying class certification are not appealable under section 1292(a)(1),[82] this decision effectively limits interlocutory plaintiffs' appeals from denials of class actions to section 1292(b) and mandamus. These two remedies are, however, available only in limited circumstances and do not provide the broad basis for appeal available under the death knell doctrine.[83]

If an interlocutory appeal is not available, members of the denied class other than the named plaintiff have few options. If the individual plaintiff pursues his case to a favorable judgement and does not appeal the adverse class ruling, it may be possible for the other members of the class to attack the order on the basis that the plaintiff was an inadequate representative.[84] But if the plaintiff loses for reasons not involved in the claims of other class members, and is deemed an inadequate class representative, he would not be a member of the class and thus could not appeal the denial of class certification.[85] The best option available to the absent members of the class appears to be that sanctioned by the Court in *United Airlines, Inc. v. McDonald.*[86]

The instant decision that the denial of class action status is not a final decision that terminates the litigation is undoubtedly sound. Allowing such appeals contradicts the express terms of section 1291,[87] even under the most liberal construction. But this decision leaves unaddressed the situation in which the individual plaintiff's claim is not economically viable—the very situation which gave rise to the death knell doctrine. In these cases the plaintiff has little choice but to seek appeal under section 1292(b).[88] If the appeal is denied, the only alternative is to invest more than the amount of the individual plaintiff's claim in order to litigate the case to a final judgment and appeal the denial of class status. The only apparent solution for these plaintiffs is legislative relief. The creation of special methods of review to insure that those plaintiffs with small claims that legitimately qualify for class action status are not arbitrarily denied relief would avoid the inefficient use of judicial machinery in making time-consuming jurisdictional determinations.

J. Harbour Mounger

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[80] See notes 46 through 70 and accompanying text *supra*.

[81] 98 S. Ct. 2451 (1978).

[82] *Id.* at 2454. See note 71 *supra*.

[83] See note 71 *supra*.

[84] See note 55 *supra*.

[85] East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). See note 55 *supra*.

[86] 432 U.S. 385 (1977). See note 55 *supra*.

[87] See note 7 *supra*.

[88] See note 71 *supra*.

JURY INSTRUCTIONS—REASONABLE DOUBT—"DON'T HAVE TO KNOW" INSTRUCTION IS NOT REVERSIBLE ERROR WHEN CONVICTION IS BASED ON DIRECT EVIDENCE

Appellant[1] appealed his conviction under the Mississippi capital murder statute[2] for the murder, in conjunction with the robbery and kidnapping, of a service station attendant.[3] The appellant and three other men had robbed the attendant at gunpoint, forced him into a car, and driven to a wooded area where they shot and killed him.[4] The trial judge charged the jury in the guilt phase of the bifurcated trial[5] with the controversial "don't have to know" jury instruction. Frequently used in Mississippi, this instruction allows the members of the jury to convict the accused without "knowing" he is guilty if they believe in his guilt beyond a reasonable doubt and to the exclusion of all other reasonable hypotheses.[6] The jury returned a verdict of guilty and a sentence of death was

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[1] Charles S. Bell was seventeen or eighteen years old at the time of the murder for which he was indicted and twenty years old at the time of the trial. Bell v. State, 360 So. 2d 1206, 1212 (Miss. 1978). The Mississippi Supreme Court had previously affirmed Bell's capital murder conviction and resulting life sentence arising from another incident that also involved murder committed in connection with a robbery. Bell v. State, 353 So. 2d 1141, 1144 (Miss. 1977).

[2] MISS. CODE ANN. § 97-3-19 (Supp. 1978). The relevant portions of the statute provide:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: . . .
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crimes of rape, burglary, kidnapping, arson, or robbery, or in any attempt to commit such felonies . . . .

[3] 360 So. 2d at 1208.

[4] Appellant and a former codefendant testified to these facts at the trial. There was, however, a conflict in the testimony concerning who actually had fired the shots that killed the attendant. Posey, the former codefendant, testified that Bell had told him that McFarland, one of the three other men, had shot the attendant in the neck and that Bell had shot him in the back. Bell, however, testified that McFarland had shot the attendant in the head, and that one of the other men, not Bell, had shot him in the back. *Id.*

[5] The United States Supreme Court has approved this form of trial, which consists of a guilt phase where the rules of evidence must be strictly observed unless or until there is a conviction, and a sentencing phase where the record is opened to include information relevant to sentencing, as constitutionally sufficient in capital murder cases. *See* Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976) (murder in conjunction with armed robbery); Jurek v. Texas, 428 U.S. 262, 276 (1976) (murder in attempted kidnapping and forcible rape); Gregg v. Georgia, 428 U.S. 153, 191-92 (1976) (armed robbery and murder). This procedure has also been prescribed by the Mississippi Supreme Court for use in capital murder cases. Jackson v. State, 337 So. 2d 1242, 1253 (Miss. 1976).

[6] *See* Pryor v. State, 239 So. 2d 911 (Miss. 1970). In *Pryor,* the instruction read as follows:

> The Court instructs the jury for the State of Mississippi that you do not have to know that the defendant is guilty before you can convict him. It is only necessary that you should believe from the evidence, beyond a reasonable doubt, and to the exclusion of very [*sic*] other reasonable hypothesis, that he is guilty, and if you do so believe from all of the evidence, beyond a reasonable doubt,

pronounced.[7] On appeal to the Mississippi Supreme Court, *held*, affirmed. Where a capital murder conviction is based on direct rather than circumstantial evidence, the trial court's having instructed the jury that they do not have to know the defendant is guilty in order to convict him is not reversible error. *Bell v. State*, 360 So. 2d 1206 (Miss. 1978).

The principle that a conviction in a criminal case must rest on the jury's belief beyond a reasonable doubt that the defendant is guilty originated in the high treason cases in Dublin around 1798.[8] Initially applied only in capital cases, the concept was not expressed in fixed language but took various forms, culminating in the use of the familiar reasonable doubt phrase.[9] An early attempt to clarify the phrase defined reasonable doubt as a "moral certainty, to the exclusion of all reasonable doubt."[10] This definition was criticized as a heaping up of indefinable terms more confusing than enlightening to the juror.[11]

In Mississippi, attempts to define reasonable doubt in jury instructions have been criticized on similar grounds.[12] The rule had early developed, however, that a judgment would not be reversed for erroneous instructions to the jury where it was manifest that the verdict was correct on the facts,[13] and that rule is still applicable today.[14] In Mississippi, one instruction that has been a

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and to the exclusion of every other reasonable hypothesis, that the defendant is guilty, then it is your sworn duty to so find.

Id. at 911-12.

[7] 360 So. 2d at 1211-12.

[8] The first appearance of this doctrine is in the reports of the Irish cases by MacNally, counsel for the defense. He stated that the rule requires the jury to acquit if they entertain reasonable doubt concerning the truth of testimony given by witnesses on the issues at hand. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321, at 682 (1954).

[9] The phrases first used were "upon clear grounds," "a clear impression," and "satisfied." Later, "rational doubt," "well-rounded doubt," and "reasonable doubt" came into use. 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2497, at 316-18 (3d ed. 1940). *See generally* 1 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE § 476 (5th Am. ed. 1834).

[10] T. STARKIE, *supra* note 9, § 476, at 418.

[11] *See* May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 658 (1876).

[12] *See* Williams v. State, 73 Miss. 820, 823, 19 So. 826, 826 (1896) (requirement of full satisfaction of guilt was vain attempt to define reasonable doubt); Burt v. State, 72 Miss. 408, 411, 16 So. 342, 343 (1894) (reasonable doubt is easily understood by jurors and should not be defined).

[13] For an exhaustive discussion of this rule and its development in Mississippi, see Lipscomb v. State, 75 Miss. 559, 611-17, 23 So. 210, 226-28 (1898) (Justice Whitfield's analysis). *See, e.g.*, Riley v. State, 18 So. 117, 118 (1895) (testimony of defendant established guilt); Hill v. State, 16 So. 901, 901 (1894) (erroneous instruction of reasonable doubt was harmless error).

[14] The rule today is that "[a]n error is harmless only when it is apparent on the face of the record that a fair minded jury could have arrived at no verdict other than that of guilty." Forrest v. State, 335 So. 2d 900, 903 (Miss. 1976). This principle is also embodied in Mississippi Supreme Court Rule 11. Entitled "No Reversal for Harmless Error," the rule provides:

constant source of appeals to the supreme court is commonly referred to as the "don't have to know" instruction.[15] An instruction that the jury is not required to know the defendant is guilty to convict him was first presented to the court in 1894 in *Brown v. State.*[16] The court skirted the issue, however, and reversed on the trial court's use of conscientious belief as a definition for reasonable doubt in the same instruction.[17] Twice within the next six years an instruction containing the "don't have to know" phrase was appealed to the court, but each time the judgment was reversed on the basis of another part of the instruction.[18] Not until 1913 did the court directly confront, in *Smith v. State,*[19] the "don't have to know" portion of an instruction on reasonable doubt. Although finding that the instruction provided no assistance to the jury and could have been properly refused,[20] the court upheld it, arguing that nothing in it lessened the quantity of evidence or degree of proof required for conviction.[21] The same instruction given in *Smith* was more severely criticized ten years later in *Jones v. State.*[22] Because of other artfully drawn instructions on reasonable doubt, the *Jones* court refused to reverse, but noted that the instruction is difficult to understand and should properly have been refused.[23] The criticism mounted in cases following *Jones,* but the court continued to hold that the giving of the instruction is not reversible error.[24] Sensing continuing dissatisfaction with the instruction, the court attempted in *Sauer v. State*[25] to justify its use by arguing that jurors

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> No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

MISS. SUP. CT. R. 11 (1976).

[15] For a typical statement of the instruction, see note 6 *supra.*

[16] 72 Miss. 95, 16 So. 202 (1894).

[17] The trial court had instructed the jury that "[y]ou are not required to know that defendant is guilty; but if you conscientiously believe, from all the testimony, he is guilty, then you should convict him, for then you have no reasonable doubt, and the case is made out to a moral certainty." The supreme court recognized that this instruction represented an attempt to define reasonable doubt, which is generally regarded as undefinable. *Id.* at 98, 16 So. at 202.

[18] *See* Jeffries v. State, 77 Miss. 757, 761-62, 28 So. 948, 948 (1900) (instruction that jury could convict if they believed defendant guilty from a fair comparison of the evidence held reversible error); Powers v. State, 74 Miss. 777, 779-80, 21 So. 657, 658 (1897) (instruction that jury could convict if, as fair, reasonable, and honest men, they were satisfied from the evidence of defendant's guilt held reversible error).

[19] 103 Miss. 356, 60 So. 330 (1913).

[20] *Id.* at 372, 60 So. at 332.

[21] *Id.* at 371-72, 60 So. at 332.

[22] 130 Miss. 703, 94 So. 851 (1923).

[23] *Id.* at 714, 94 So. at 852.

[24] *See* Tatum v. State, 142 Miss. 110, 118, 107 So. 418, 419 (1926) (instruction criticized as confusing), *overruled on other grounds,* Grant v. State, 172 Miss. 309, 314, 160 So. 600, 601 (1935); Cain v. State, 135 Miss. 892, 902-03, 100 So. 578, 581 (1924) (citing *Jones*); Harris v. State, 135 Miss. 171, 182-83, 99 So. 754, 757 (1924) (instruction should be avoided because it is more confusing than enlightening).

[25] 166 Miss. 507, 144 So. 225 (1932).

are never required to know facts absolutely; they must decide from the evidence only whether the defendant is guilty beyond a reasonable doubt.[26] This justification was apparently successful since for the next several years the cases considering the instruction upheld its use.[27]

In *Bourne v. State*[28] the court changed its policy by holding that the instruction should not be given in the future, and that where a close question exists on the facts, the giving of the instruction will constitute reversible error.[29] The court did not, however, articulate guidelines explaining what constitutes a close factual question. Despite the court's admonition against use of the instruction, trial courts continued giving it, and the supreme court continued upholding it in cases where the facts were clearly established.[30] The court reasoned in such cases that the "don't have to know" instruction is one of a class of instructions that are better not given but which, in themselves, do not constitute reversible error.[31]

Four years later, however, as if to prove that the dicta in *Bourne* had been purposefully made, the court held in *Pryor v. State*[32] that the giving of the instruction in a case based on circumstantial evidence constituted reversible error.[33] The *Pryor* opinion did not limit the possibility of reversal for use of the instruction to cases built on indirect evidence,[34] but it did recognize the principle

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[26] *Id.* at 523, 144 So. at 229. Three years later, Justice Ethridge, writing for the court as he had in *Sauer*, stated that knowledge is not always attainable, and, where it is, a juror will be deemed incompetent to serve if he has actual knowledge of any of the facts of the case. Therefore, he reasoned, the "don't have to know" instruction is a correct statement of the law. Allgood v. State, 173 Miss. 27, 33, 161 So. 756, 758 (1935).

[27] *See, e.g.*, Walton v. State, 212 Miss. 270, 274, 54 So. 2d 391, 392 (1951) (approving use of the instruction); Bolin v. State, 209 Miss. 866, 873, 48 So. 2d 581, 584 (1950) (noting the *Sauer* justification for using the instruction); Sanders v. State, 192 So. 344, 344 (Miss. 1939) (citing *Sauer* and *Allgood*); Powers v. State, 168 Miss. 541, 555, 151 So. 730, 734 (1933) (holding instruction not reversible error even though it sheds no light on the case).

[28] 185 So. 2d 677 (Miss. 1966).

[29] Justice Inzer, writing for the court, admonished prosecuting attorneys not to request the instruction and trial judges not to grant it. *Id.* at 680.

[30] *See* Pieratt v. State, 235 So. 2d 923, 925 (Miss. 1970) (facts established through testimony of manager of burglarized store); Collins v. State, 202 So. 2d 644, 646 (Miss. 1967) (upholding instruction, citing older cases that had held instruction not reversible error).

[31] The court held in Carroll v. State, 215 So. 2d 871 (Miss. 1968), that the instruction contained a correct statement of an abstract principle of law, and that evidence of guilt was ample for conviction. *Id.* at 872; *see, e.g.*, McGill v. State, 235 So. 2d 451, 452 (Miss. 1970) (instruction might be held reversible error in closer case); Byrd v. State, 228 So. 2d 874, 887 (Miss. 1969) (instruction has been criticized but never held reversible error); Walker v. State, 222 So. 2d 116, 118 (Miss. 1969) (citing *Carroll* and earlier authorities holding instruction not reversible error).

[32] 239 So. 2d 911 (Miss. 1970).

[33] *Id.* at 912.

[34] In reversing, the court stated: "The case now before the Court is a good example of the unfairness of this instruction since it is now being used in a circumstantial evidence case." *Id.*

that a higher standard of reasonable doubt is required in such cases.[35]

Although after *Pryor* it appeared that the "don't have to know" instruction would be condemned whenever used,[36] only two months after *Pryor* had been handed down the court decided four cases dealing with the instruction that cast confusion upon the issue of when the instruction would be held to be reversible error. In *Nobles v. State,*[37] a case based on both direct and circumstantial evidence, the court held that the *Pryor* decision did not apply retroactively but that the giving of the instruction in circuit courts after the date *Pryor* was decided would be held reversible error.[38] Nevertheless, in two circumstantial evidence cases handed down the same day but reported before *Nobles*, the court held the instruction reversible error although both cases had been tried before the *Pryor* decision.[39] In the final case of the series, *Jones v. States,*[40] reported after *Nobles*, the court refused to hold use of the instruction reversible error.[41] The court reasoned that since *Jones* had been tried before the *Pryor* decision, *Nobles* rendered *Pryor* inapplicable, but the court advanced as an additional reason for allowing use of the instruction the fact that the conviction was based on direct evidence.[42] In a later decision the court indicated, without

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[35] The court stated that for circumstantial evidence to establish a fact above mere suspicion, the evidence must exclude every reasonable hypothesis besides guilt. *Id.* at 913 (citing Love v. State, 208 So. 2d 755, 757 (Miss. 1968), and Westbrook v. State, 202 Miss. 426, 432-33, 32 So. 2d 251, 252 (1947)); *see, e.g.*, Williams v. State, 95 Miss. 671, 676-77, 49 So. 513, 513-14 (1909) (stating the same general rule); Haywood v. State, 90 Miss. 461, 466-67, 43 So. 614, 615 (1907) (distinguishing circumstantial and direct evidence); Algheri v. State, 25 Miss. 584, 589 (1853) (evidence that beyond a reasonable doubt excludes every hypothesis besides guilt invests mere circumstances with force of truth). *See generally* Bonner, Jones, & Miller, *The Charge in Criminal Cases,* 12 BAYLOR L. REV. 261, 284-85 (1960) (discussing instructions on circumstantial evidence).

[36] Only six days after *Pryor* was decided, the court again took the opportunity to conclude that the instruction is reversible error, but only after having decided that the case must be reversed on other grounds. Spencer v. State, 240 So. 2d 260, 263 (Miss. 1970).

[37] 241 So. 2d 826 (Miss. 1970).

[38] *Pryor* was decided on September 28, 1970. The court condemned the instruction as palpably unfair and misleading and as an obvious effort to placate the caution of jurors to require satisfactory evidence of guilt, but did not reverse because the case was tried before *Pryor* was decided. *Id.* at 827-28.

[39] In Pitts v. State, 241 So. 2d 668 (Miss. 1970), the court recognized the fact that, as in *Pryor,* the "don't have to know" instruction is especially unfair to the defendant in a circumstantial evidence case and, when granted, is fatal error. *Id.* at 670-71. In Kent v. State, 241 So. 2d 657 (Miss. 1970), the court, after the *Pryor* decision, had allowed the appellant to amend his assignment of errors to include the granting of the "don't have to know" instruction. *Id.* at 660. In holding the instruction reversible error, the court quoted language in *Pryor* indicating that the instruction is especially unfair in a circumstantial evidence case. *Id.*

[40] 241 So. 2d 829 (Miss. 1970).

[41] *Id.* at 831-32.

[42] The court stated: "We hold that the giving of the instruction is not a reversible error in a case such as this, which is not a case of circumstantial evidence." *Id.* at 831-32. The decision did not indicate, however, whether this language referred only to cases tried

explicitly addressing the question, that the giving of the "don't have to know" instruction may be reversible error in cases other than those based upon circumstantial evidence.[42] In subsequent decisions, however, the court found continuing utility in the direct-circumstantial dichotomy, apparently interpreting the *Nobles* ban on retroactive application of *Pryor*[44] as limited to cases based on direct evidence.[45] Since these decisions and prior to 1978, no cases dealing specifically with the "don't have to know" instruction have been decided by the supreme court, but the court has taken the opportunity, in considering other instructions, to condemn it as prejudicial.[46] In fact, the court has even stated without limitation that no attempt to define reasonable doubt should be made in jury instructions.[47]

In the instant case the court noted that the "don't have to know" instruction had previously been held reversible error only in cases where the conviction was based on circumstantial or predominantly circumstantial evidence.[48] Since the evidence presented in the instant case was direct, was sufficiently clear to support the jury's finding of guilt, and warranted the penalty imposed, the trial court's having given the instruction was not, the court concluded, reversible error.[49] Reasoning that since beyond a reasonable doubt[50] the verdict would have

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before *Pryor* in deciding whether *Nobles* is applicable, or whether it referred to the use of this instruction in general, whether before or after the *Pryor* decision. *Id.* at 831-32.

[43] In Murphy v. State, 246 So. 2d 920 (Miss. 1971) the appellant had argued that, even though the case was tried before *Pryor,* it was one of circumstantial evidence and the use of the instruction should be held reversible error. The court affirmed the conviction because there was direct testimony in the case, but also stated that "[i]t may be well for us to point out here that we believe that this instruction is unfair in all criminal cases, and especially in circumstantial evidence cases." *Id.* at 922.

[44] See notes 37 through 42 and accompanying text *supra.*

[45] *See* Kidd v. State, 258 So. 2d 423, 428 (Miss. 1972) (in direct evidence case *Nobles* prevents application of *Pryor* rule); *cf.* Gilleylen v. State, 255 So. 2d 661, 664 (Miss. 1971) (circumstantial evidence case holding instruction reversible error although case was tried before *Pryor* decision).

[46] *See* Thorne v. State, 348 So. 2d 1011, 1015 (Miss. 1977) (although instruction was argumentative, it did not reach the prejudicial proportions of the "don't have to know" instruction). In the only case found outside Mississippi considering an instruction using the "don't have to know" phrase, the court held the instruction prejudicial without regard to whether the conviction was based on direct or circumstantial evidence. Laird v. State, 476 S.W.2d 811, 813 (Ark. 1972).

[47] *See* Gray v. State, 351 So. 2d 1342, 1348 (Miss. 1977) (capital murder case holding that reasonable doubt should not be defined in instructions to jury); Pittman v. State, 350 So. 2d 67, 71 (Miss. 1977) (such instructions should not be given for either prosecution or defense).

[48] Although not citing any authority for this proposition, the court may have been relying on the implication in *Pryor* that the instruction is especially unfair in circumstantial evidence cases. 239 So. 2d at 912. The court may have reasoned that, by implication, the language used there limited the holding to circumstantial evidence cases.

[49] 360 So. 2d at 1215.

[50] Although no authority was cited in support of this point, the court was probably cognizant of the United States Supreme Court's holding that in deciding what constitutes harmless error where the error may affect a federal constitutional right such as procedural

been the same had the questionable instruction not been given,[51] the court held that use of the instruction in the present case merely amounted to harmless error.[52] The court also explained that the defendant had received a fair trial in spite of the giving of the instruction.[53]

In a vigorous dissent Justice Broom pointed out that none of the previous decisions holding use of the instruction reversible error had been limited to cases based entirely or predominantly on circumstantial evidence.[54] Moreover, since the previous decisions had all involved a punishment less severe than death, Justice Broom argued, approval of the instruction's use should not depend, especially in a capital murder case, upon the subjective opinion of a majority of the justices that the jury had not been influenced by the giving of the instruction.[55] Applying general rules pertaining to jury instructions, he analyzed the "don't have to know" instruction as an improper charge on a material issue the detrimental effect of which cannot be cured by the giving of a correcting instruction.[56] Justice Broom therefore concluded that the instruction given in the instant case should be held reversible error or, in any event, should not be upheld on the basis of how much attention the justices believe the jury paid to it.[57]

As a result of the *Bell* decision, both district attorneys and trial judges will be confused as to when the giving of the "don't have to know" instruction is proper. Rather than overruling precedent holding the instruction reversible error, the court attempted simply to limit and define those decisions.[58] Although a superficial reading of *Bell* seems to indicate that the instruction will be held reversible error where the evidence is circumstantial or predominantly so[59] but not where the evidence is direct, closer scrutiny reveals that, if *Bell* is followed, use of the instruction may be upheld only in those direct evidence cases in which the court concludes beyond a reasonable doubt that the jury would have reached

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due process under the fourteenth amendment, the appellate court must be able to declare that, "beyond a reasonable doubt," such error was harmless. Chapman v. California, 386 U.S. 18, 24 (1967).

[51] 360 So. 2d at 1215. The court also considered an instruction stating that "if you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other hypothesis consistent with innocence that the defendant was engaged in the criminal act of armed robbery or kidnapping, then you shall find the accused guilty of capital murder." *Id.* at 1213. The element of murder was not included in the instruction. The court reasoned, however, that since this instruction was corrected by another instruction given on reasonable doubt, it did not constitute reversible error. *Id.* at 1215.

[52] *Id.* at 1215. See note 14 *supra.*

[53] 360 So. 2d at 1215.

[54] *Id.* at 1217 (citing *Pryor* and cases decided subsequent to it (Broom, J., dissenting)).

[55] *Id.* at 1218.

[56] 360 So. 2d at 1218 (citing McHale v. Daniel, 233 So. 2d 764, 768-69 (Miss. 1970) (jury may not be able to distinguish between correct and incorrect instructions)).

[57] 360 So. 2d at 1218. Justice Broom implied that the court had, in the most serious of all cases, upheld a relaxation of content requirement previously enunciated by the court for jury instructions.

[58] See notes 35 through 44 *supra.*

[59] 360 So. 2d at 1215.

the same decision had the instruction not been given.[60] Thus, whether the giving of the instruction will be held reversible error appears to depend upon a subjective standard—the opinion of a majority of the justices that the jury was not or could not have been misled by the instruction.[61] Such a standard provides little guidance either to district attorneys in deciding whether to request the instruction or to trial judges in deciding whether to grant it.

The *Bell* decision supports the generally recognized policy of not allowing a conviction to be overturned on a mere technicality,[62] and is in line with Mississippi's harmless error rule.[63] Conflicting public policy requires, however, that an accused, especially in a case of the magnitude of *Bell,* be given a fair trial free from substantial error. In light of recent decisions condemning attempts to define reasonable doubt[64] and indicating that the law does not distinguish between the weight to be given direct and circumstantial evidence,[65] there is strong authority for holding the "don't have to know" instruction reversible error, even when the conviction is based on direct evidence. In fact, model jury instructions promulgated by the Mississippi Circuit Judge's Association suggest that no instruction explaining or attempting to define reasonable doubt should be given to the jury.[66] The adoption of this recommendation would give both attorneys

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[60] Even based on this standard, the decision is questionable since the testimony in *Bell* was not totally without conflict on a material point—whether the defendant had actually shot the victim. See note 4 *supra.*

[61] See text accompanying note 55 *supra.*

[62] *See, e.g.,* Harris v. State, 135 Miss. 171, 184, 99 So. 754, 757 (1924), stating that decisions will not be reversed because of mere technicalities when the verdict is manifestly correct.

[63] The policy behind this rule has been well stated by the Mississippi Supreme Court:

> We would be unworthy of the high places we hold, if, convinced that vital error had been committed—error showing that a fair and impartial trial has not been had—we did not unhesitatingly reverse the judgment, in order that the defendant, however guilty, when finally sentenced to death, after having had a trial fair and impartial, may not be able, dying, to charge the administration of justice with an execution unsanctioned by the law of the land.

Owens v. State, 80 Miss. 499, 516, 32 So. 152, 155 (1902).

[64] See note 47 and accompanying text *supra.* For a criticism of attempts to define reasonable doubt as a tool of legal tacticians, see 9 J. WIGMORE, *supra* note 9, § 2497, at 319-20.

[65] In a case from Mississippi, the Fifth Circuit upheld an instruction stating that the law makes no distinction between the weight to be given the two kinds of evidence. The law requires only that the jury weigh all the evidence and, in order to convict, be convinced of the guilt of the defendant beyond a reasonable doubt. The instruction did not enunciate the additional requirement usually found in circumstantial evidence cases that reasonable doubt must exclude all reasonable hypotheses other than that of guilt. *See* United States v. Clark, 506 F.2d 416, 417 (5th Cir.) (conviction of robbery and putting life in jeopardy by use of a dangerous weapon), *cert. denied,* 421 U.S. 967 (1975). This decision seems to indicate that courts may not be warranted in treating the two kinds of evidence differently, or at least that they are warranted in refusing to make a distinction between the two.

[66] *See* MISSISSIPPI MODEL JURY INSTRUCTIONS: *Civil and Criminal* § C.17, at 20 (1977).

and judges a solid standard to work with and would alleviate some of the confusion compounded by the *Bell* decision.

Bell was decided by a five-to-four majority that cited no authority for its upholding of the instruction. On the other hand, the dissenting opinion is strong and well reasoned. If this issue is again presented to the court a different result could, and should, be reached. In the meantime, district attorneys should not request, nor should trial judges grant the "don't have to know" jury instruction.

Thomas E. Williams

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GENERAL INDEX

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SUBJECT INDEX

ADMIRALTY

Strict Products Liability 495-504

ADMINISTRATIVE LAW

Judicial Administration of Policy 814-18

ALIMONY

See FAMILY LAW

ANTITRUST

Sherman Act 725-26
Sherman Act: Municipal Immunity 725, 733-38
Sherman Act: State Immunity 727-32
Sherman Act: Violation by Private Person Complying With State Law 727

APPEAL AND ERROR

1977 Mississippi Decisions 447

ATTORNEYS' FEES

Assessment Against a Private Litigant 271-72
Awards to Legal Aid Groups Under the Private Attorney General Theory 276
Federal Power Commission's Lack of Authority to Award Attorneys' Fees to Intervenor Representing Public Interest 276-78
Public Interest Cases 271
Refusal to Shift Attorneys' Fees from Unsuccessful Environmental Groups to Successful Private Litigants 274-75
Reimbursement by the Federal Government: Senate Bill 270—Authorizing Administrative Agencies and Courts to Award Attorneys' Fees from the Federal Treasury 271-74
Reimbursement by the Federal Government: Senate Bill 270—Award of Attorneys' Fees in Proceedings Involving Issues That Relate Directly to Health, Safety, Civil Rights, the Environment, and the Economic Well-Being of Consumers in the Market Place 279
Reimbursement by the Federal Government: Senate Bill 270—Criticism of the Eligibility Standard Language 281
Reimbursement by the Federal Government: Senate Bill 270—Funding of the Proposed Legislation 280
Reimbursement by the Federal Government: Senate Bill 270—The Judicial Review Provision 282
Reimbursement by the Federal Government: Senate Bill 270—Persons Eligible to Receive an Award 280-81
Reimbursement by the Federal Government: Senate Bill 270—Prospective and Retroactive Awards of Attorneys' Fees 281-82

BAIL

Extension of Professional Bail Bond Act to Nonprofessionals 352-54

BANKRUPTCY

Creditor Status of Mortgagee Not in Possession 505-17
Priority to Rents 506-17

BANKS AND BANKING

Construction Liens: Lender's Priority 430-31

BILLS AND NOTES

See COMMERCIAL LAW

CAPITAL PUNISHMENT

Bifurcated Trial Procedure 344, 347-48
Discretionary Sentencing 345-46
Granting of Instructions Concerning Lesser Included Offenses 349-50
Mandatory Death Penalty Statutes 345-47
Pro and Con 767
Rape 350-52

CIVIL PROCEDURE

Claim and Delivery Action 447-48
Jurisdiction 740-41
Jurisdiction: Default Judgments 745-49
Jurisdiction: Distinguished from Venue 740
Jurisdiction: Service of Process 741-44
Proposed Mississippi Rules of Civil Procedure:
Advisory Committee—Composition 288
Proposed Mississippi Rules: Advisory Committee—Creation 285-88
Proposed Mississippi Rules: Advisory Committee—Methodology 289-90
Proposed Mississippi Rules: Areas That Would Not
Be Affected 290-91
Proposed Mississippi Rules: Beneficial Changes—
Computation of Time 292-93
Proposed Mississippi Rules: Beneficial Changes—
Default Judgments 294-95
Proposed Mississippi Rules: Beneficial Changes—Nonsuits 295-96
Proposed Mississippi Rules: Beneficial Changes—
Service of Process 294
Proposed Mississippi Rules: Beneficial Changes—
Summary Judgment 295
Proposed Mississippi Rules: Beneficial Changes—
Time for Filing Motion for a New Trial 293-94
Proposed Mississippi Rules: Beneficial Changes—
Venue in Transitory Causes of Action Against
Resident Defendants 296-97

Reform of Civil Practice in Mississippi:
Discovery Proceedings Act 285
Venue 742-43
Venue: Default Judgments 739-40, 745-49
Venue: Distinguished from Jurisdiction 740
Venue: Service of Process 743-44

CLASS ACTIONS

Appeals from Certification Orders 983
Class Action Certification 978-82
Jurisdiction of Appeals From Class Action Certification 980-82

CLOSE CORPORATIONS

Drafting Techniques: Advantages and Disadvantages of
Argeements and Voting Trusts 543
Drafting Techniques: Charter and Bylaw Provisions 531-33
Drafting Techniques: High Quorum Requirement 539
Drafting Techniques: Limitations of Veto Arrangements 539-40
Drafting Techniques: Transfer of Decision-Making
to Shareholders 538-39
Drafting Techniques: Use of Employment Contracts 543-45
Drafting Techniques: Use of Shareholders' Agreement 540-43
Drafting Techniques: Use of Voting Trusts 542-43
Drafting Techniques: Veto Arrangements 533-38
Options and Buy-Outs: Combinations of First Options
and Buy-Outs 550-51
Options and Buy-Outs: Funding With Business Insurance 553
Options and Buy-Outs: Importance of Setting Transfer Price 551-53
Options and Buy-Outs: Successive Options 549-50
Options and Buy-Outs: Tax Consequences 553-54
Preventive Law: Flexibility Through Planning 558
Preventive Law: Lawyer's Role in Tailoring
Corporate Form 529-30
Problems Between Participants' Use of Arbitration 556-58
Problems Between Participants' Use of Buy-Out
Arrangements 555-56
Problems Between Participants' Use of Dissolution Provisions 556
Stock Transfer Restrictions: Kinds of Restrictions 547-48
Stock Transfer Restrictions: Legislation on Share
Restrictions 548-49
Stock Transfer Restrictions: Necessity of Restrictions 545-47
Stock Transfer Restrictions: Tax Consequences 553-54

COMMERCIAL LAW

Banks and Banking: Good Faith Obligation 325
Bills and Notes: Fraud in the Factum 330-32
Bills and Notes: Waiver of Cause of Action by
Maker of Promissory Note 333-36
Sales: Parol Evidence Rule 336-39
Sales: Warranty of Future Performance 339-41
Secured Transactions: Attachment of Security Interest 341-43

CONSTITUTIONAL LAW

Due Process: Liberty Interests ... 523-27
Eighth Amendment: Administration of Death Penalty Under Discretionary Statutes ... 345-46
Eighth Amendment: Mandatory Death Penalty Statutes ... 345-47
Fifth Amendment: Constitutionality of Federal Immunity Statutes ... 602-05
Fifth Amendment: Relation Between Grand Jury Immunity and Fifth Amendment Privilege ... 591-616
First Amendment: Constitutionality of the Mississippi Campaign Reform Bill ... 829-37
Fourteenth Amendment: Equal Protection Problem in Restriction of Corporation's Expenditures in Campaign Financing ... 831-32
Fourteenth Amendment: No Liberty Interest of Foster Parents in Foster Children ... 518-27
Fourteenth Amendment: Question of Whether Free Speech is a Fundamental Interest ... 834-35
Fourteenth Amendment: Right of Support for Illegitimates ... 452-55
Fourteenth Amendment: Sex Discrimination in Alimony Payable Only to the Wife ... 374-76
Fourth Amendment: Availability of Veracity Hearing ... 972
Fourth Amendment: Exclusionary Rule ... 963
Fourth and Fourteenth Amendments: Unreasonable Search ... 962
Invasion of Privacy: State Protection ... 963
Taxation of Foreign Corporations ... 449-52
Unreasonable Search and Seizure: Admission of Evidence ... 963-65

CONTRACTS

Secured Land Transactions ... 455-58
Specific Performance of Insurance Contract ... 399-402

CONVEYANCES

See PROPERTY

CORPORATE FREE SPEECH

Boundaries of Protected Speech ... 827-29
Effect of the Mississippi Statute ... 829-31
Restricting the Amount of Corporate Expenditures in Campaign Financing ... 829-30

CORPORATIONS

See CLOSE CORPORATIONS

Mississippi Campaign Reform Bill ... 819-20
Personal Liability of Incorporators ... 319-22
Piercing the Corporate Veil ... 322-24
State Regulation of Political Contributions by Corporations: Conviction of Corporation Under State Corrupt Practices Act ... 824-25

State Regulation of Political Contributions by Corporations: Direct Contributions ... 821
State Regulation of Political Contributions by Corporations: Manner in which Different States Have Regulated Contributions ... 822-24

COURTS

Burden of Hearings on Affidavits ... 970-71
Rulemaking Power of the Mississippi Supreme Court ... 618-21

CRIMINAL LAW

Capital Statute ... 985

CRIMINAL PROCEDURE

Arrest With Warrant ... 626-33
Arrest With Warrant: Requirements—Authority to Issue Warrant ... 630-32
Arrest With Warrant: Requirements—Correction of Formal Errors ... 632-33
Arrest With Warrant: Requirements—Form of a Warrant ... 632
Arrest With Warrant: Requirements—Probable Cause ... 628-30
Arrest Without Warrant: Felony Arrests ... 637
Arrest Without Warrant: Felony Committed Outside an Officer's Presence ... 638
Arrest Without Warrant: Informing The Defendant of His Arrest ... 638-40
Arrest Without Warrant: Offenses Committed in the Officer's Presence ... 633-36
Arrest Without Warrant: Officer's Knowledge of An Existing Misdemeanor Warrant ... 636-37
Bifurcated Trial Procedures in Capital Punishment Cases ... 344, 347-48
Capital Punishment: Bifurcated Trial ... 985
Constitutionality of Reciprocal Discovery ... 646-49
Confrontation Clause and Federal Rule of Evidence 703 ... 17-18
Criminal Discovery in Mississippi: Discovery Rights of Defendant—Evidence in the State's Possession ... 641-42
Criminal Discovery in Mississippi: Discovery Rights of Defendant—Informants ... 643
Criminal Discovery in Mississippi: Discovery Rights of Defendant—Statements of Witnesses ... 644-45
Criminal Discovery in Mississippi: Discovery Rights of Defendant—Tangible Items ... 643-44
Discretionary Sentencing in Capital Punishment Cases ... 345-46
Ex parte Search Warrant ... 970
Extension of Professional Bail Bond Act to Nonprofessionals ... 352-54
Granting of Instructions Concerning Lesser Included Offenses in Capital Cases ... 349-50
Harmless Error ... 991-92

Jury Instructions ... 985-93
Mandatory Death Penalty Statutes ... 345-47
Misdemeanor Cases: Strategy ... 763-66
Misdemeanor Courts ... 761-63
Motion to Suppress Evidence: Intent to Deceive ... 968-69
Motion to Suppress Evidence: Material Misstatement ... 968-69
Proposed Criminal Rules of Circuit Court Practice ... 649-57
Proposed Criminal Rules of Circuit Court Practice: Constitutionality of the Rules ... 618-23
Proposed Criminal Rules of Circuit Court Practice: Denial of Disclosure ... 652-53
Proposed Criminal Rules of Circuit Court Practice: Disclosure by the Defendant ... 653-54
Proposed Criminal Rules of Circuit Court Practice: Disclosure by the Prosecution ... 650-52
Proposed Criminal Rules of Circuit Court Practice: Regulatory Procedures ... 654-57
Reciprocal Criminal Discovery ... 640-57
Retroactivity ... 989
Reversible Error ... 985-93
Rulemaking Power of Circuit Court Judges ... 621-23
Search Warrant: Probable Cause ... 964-65
Search Warrant: Veracity Challenge ... 962-72
Veracity Challenge: Negligent or Innocent Misstatements ... 968-70
Veracity Hearing ... 965-70
Veracity Hearing: Alternative Sanctions ... 970
Written Opinions in Criminal Appeals ... 620-21

DAMAGES

See EMINENT DOMAIN; LANDLORD AND TENANT

Punitive Damages for Wrongful Refusal of First Party Insurance Claims ... 380-85

DEEDS OF TRUST

Construction Liens: Lender's Priority ... 430-31

DOMESTIC RELATIONS

See FAMILY LAW

DUE PROCESS

Familial Rights ... 523-27

EASEMENTS

See EMINENT DOMAIN

ELECTIONS

Campaign Expenditures Versus Investment Expenses ... 929
Deductibility of Campaign Expenses by a Political Candidate ... 928-31
Deductibility of Contributions by Businesses and Individuals ... 932-43

Deductibility of Impartial Quasi-Political Contributions 942-43
Disposition of Unexpended Campaign Funds 925-26
Exempt Function Income 917-18
Gift Tax Aspects of Political Contributions 946-50
Income of Political Campaign Organizations 917-21
Political Campaign Organizations 912-15
The Political Candidate and Personal Taxability 923-32
The Political Contributor 932-46
Political Gifts 946-50
"Primary Purpose" Test Qualifying for Tax-Exempt Status in Political Campaigns 916-17
Realization and Recognition of Income From Contributors 943-45

EMINENT DOMAIN

Apportionment of Damages of Leasehold 417-18
Computation of Compensation 408-10
Equitable Treatment of Displaced Persons 416-17
Evidence of Value 413
Inverse Condemnation 411-13
Necessary Parties 417-18
Procedural Aspects: Notice 410-15
Supplemental Taking 410-11

EMPLOYEES

See ERISA

Boards and Commissions 302-18
Employment Security Commission 312-17
Maternity Leaves 312-17
Workmen's Compensation 302-12

ENVIRONMENTAL LAW

Administrative Procedure 785-96
Constitutional Ramifications: Due Process 778
Constitutional Ramifications: Ninth Amendment 778
Judicial Interpretation of Detail Required in Environmental Impact Statements 785-86
Judicial Interpretation of National Environmental Protection Act: Balancing Test 782-83
Judicial Interpretation of National Environmental Protection Act: Judicial Administration of Policy 811-14
Judicial Interpretation of National Environmental Protection Act: Judicial Policymaking 781-85
Judicial Interpretation of National Environmental Protection Act: Litigation as an Alternative to the Political Process 818
Judicial Interpretation of National Environmental Protection Act: Meaning and Procedural Requirements 781-85

Judicial Interpretation of National Environmental Protection Act: NEPA Creates Judicially Enforceable Duties ... 782
Judicial Interpretation of National Environmental Protection Act: Standing ... 783-84
Judicial Interpretation of National Environmental Protection Act: Strict Adherence to Policy Decision Required ... 781
Judicial Policymaking ... 781-85
Judicial Review of Administrative Decisions: Good Faith Test ... 792-94
Judicial Review of Administrative Procedures and Decisions on the Merits ... 789-90, 795-96
Supreme Court Review of Administrative Decisions ... 797-806

EQUAL PROTECTION

Disparate Treatment of Juveniles and Adults ... 463-64
Right of Support for Illegitimates ... 452-55

ERISA (EMPLOYEE RETIREMENT INCOME SECURITY ACT)

Attorneys' Fees ... 269-70
Exculpatory Clauses, Bonding and Insurance ... 255-56
Fiduciary Duties ... 262-65
Fiduciary, Generally ... 261-62
Jurisdiction ... 250-53
Potential Parties ... 247-50
Preemption ... 256-61
Pre-ERISA Pension Rights ... 242-47
Prohibited Transactions ... 265-67
Remedies for Fiduciary's Breach of Duty ... 267-68
Reporting and Disclosure ... 268-69
Venue, Process and Statute of Limitations ... 253-55

EVIDENCE

Admissibility of Search Warrant Affidavits ... 361-63
Admissions by Party-Opponent ... 47-54
Attacking and Supporting Credibility of Declarant ... 147-49
Authentication and Identification: Ancient Documents of Data Compilation ... 175-77
Authentication and Identification: Comparison by Trier or Expert Witness ... 165-67
Authentication and Identification: Computers ... 179-80
Authentication and Identification: Distinctive Characteristics and the Like ... 167-70
Authentication and Identification: Movies ... 178-79
Authentication and Identification: Nonexpert Opinion on Handwriting ... 163-65
Authentication and Identification: Pretrial Authentication ... 194-95
Authentication and Identification: Process or System ... 177-81
Authentication and Identification: Public Records or Reports ... 174-75

Authentication and Identification: Requirement of Authentication or Identification 154-55
Authentication and Identification: Self-Authentication under Rule 902 181-92
Authentication and Identification: Subscribing Witness' Testimony Unnecessary 192-94
Authentication and Identification: Surveys, Samples and Polls 180
Authentication and Identification: Telephone Conversations 172-74
Authentication and Identification: Testimony of Witness with Knowledge 155-63
Authentication and Identification: Test and Experiments 180-81
Authentication and Identification: Voice Identification 170-72
Authentication and Identification: X-Rays 177-78
Circumstantial Evidence 989-90
Declarant, Definition 36
Direct Evidence 988-91
Evolution of Federal Rules of Evidence 33
Evolution of Hearsay Rule 32-33
Exclusion of Hearsay in Mississippi 55-56
Exclusion of Hearsay under Federal Rules of Evidence 54-55
Hearsay, Definition 36-38
Hearsay as Defined by the Mississippi Courts 38-42
Hearsay Exceptions: Absence of Business Records 85-87
Hearsay Exceptions: Absence of Public Record or Entry 94-96
Hearsay Exceptions: Declarations of Emotional State 66
Hearsay Exceptions: Declarations of Mental State 66-67, 70-71
Hearsay Exceptions: Declarations of Physical Condition 67, 70
Hearsay Exceptions: Excited Utterance in Mississippi 56-59
Hearsay Exceptions: Family Records 98-99
Hearsay Exceptions: Former Testimony 132-36
Hearsay Exceptions: Judgments of Personal, Family or General History, or Boundaries 117-18, 120-21
Hearsay Exceptions: Judgments of Previous Convictions 117-21
Hearsay Exceptions: Learned Treatises 106-11
Hearsay Exceptions: Market Reports, Commercial Publications 104-06
Hearsay Exceptions: Marriage, Baptismal Certificates 97-98
Hearsay Exceptions: Other Exceptions—Needed and Reliable Statements 121-27
Hearsay Exceptions: Presence of Business Records 78-85
Hearsay Exceptions: Present Sense Impression 56-59
Hearsay Exceptions: Prior Identification 46-47, 358-61
Hearsay Exceptions: Public Records and Reports 87-92
Hearsay Exceptions: Recorded Recollection 74-78
Hearsay Exceptions: Records of Documents Affecting an Interest in Property 99-101
Hearsay Exceptions: Records of Vital Statistics 92-94
Hearsay Exceptions: Religious Records 96-97
Hearsay Exceptions: Reputation Concerning Character 116-17

Hearsay Exceptions: Reputation Concerning Boundaries or General History 114-15, 120
Hearsay Exceptions: Reputation Concerning Personal or Family History 111-14, 120, 144
Hearsay Exceptions: Res Gestae 59-66
Hearsay Exceptions: Statements in Ancient Documents 101-104
Hearsay Exceptions: Statements Under Belief of Impending Death—Dying Declaration 137-39
Hearsay Exceptions: Statements in Documents Affecting an Interest in Property 99-101
Hearsay Exceptions: Statements Made for Medical Diagnosis or Treatment 71-74
Hearsay Exceptions: Statements of Intention 68-70
Hearsay Exceptions: Statements Against Interest 139-43
Hearsay Exceptions: Statements of Memory or Belief 67-68
Hearsay Exceptions: Statements of Personal Family History 143-44
Hearsay Exceptions: Unavailability, Defined 128-32
Hearsay Within Hearsay 145-47
Marital Privilege in Child Abuse Cases 354-58
Nonhearsay Statements under Federal Rules of Evidence 801(d) 42-45, 48-50
Opinion and Expert Testimony: Application of Federal Rule of Evidence 703 in Criminal Cases 17-18
Opinion and Expert Testimony: Bases of Opinion Testimony by Experts 15-19
Opinion and Expert Testimony: Court-appointed Experts 26-29
Opinion and Expert Testimony: Disclosure of Facts and Data Underlying Expert Opinion 19-20
Opinion and Expert Testimony: Expert Testimony 11-14, 20-23
Opinion and Expert Testimony: Lay Opinion Testimony 2-10
Opinion and Expert Testimony: Opinion on Ultimate Issue 23-26
Opinion and Expert Testimony: Reasonable Compensation for Expert Witnesses 29
Prior Identification by Witness 45-47
Prior Statement by Witness 42-47
Statement, Definition 34-36
Writings, Recordings and Photographs: Admissibility of Duplicates 209-212
Writings, Recordings and Photographs: Admissibility of Other Evidence of Contents 212
Writings, Recordings and Photographs: Collateral Matters 219-21
Writings, Recordings and Photographs: Duplicate, Definition of 202-04
Writings, Recordings and Photographs: Functions of Court and Jury 229-30
Writings, Recordings and Photographs: Original, Definition of 200-02
Writings, Recordings and Photographs: Originals Lost or Destroyed 212-16
Writings, Recordings and Photographs: Original not Obtainable by Judicial Process 216-18

Writings, Recordings and Photographs: Original in Possession of Opponent 218-19
Writings, Recordings and Photographs: Photographs, Definition of 200
Writings, Recordings and Photographs: Public Records 221-22
Writings, Recordings and Photographs: Requirements of Original 204-09
Writings, Recordings and Photographs: Summaries 223-27
Writings, Recordings and Photographs: Testimony or Written Admission of Party 227-29
Writings, Recordings and Photographs: Writings and Recordings, Definition of 198-200

FAMILY LAW

Alimony and Child Support 372-76
Child Custody and Adoption 365-70
Child's Right to Representation in Custody Dispute 368-70
Gender-based Classifications for Alimony 374-76
Partition Action Involving Divorced Spouses 421
Right of Support for Illegitimates 452-55
Separate Maintenance in Marital Relationship 370-71

FEDERAL JURISDICTION

Abstention: Abstention Based on Judicial Convenience or Economy or Congested Docket 951-61
Abstention: Early Nonrecognition of Abstention 952-53
Abstention: Traditional Justification for Abstention 953-55

FEDERAL RULES OF EVIDENCE

See EVIDENCE

FRAUD

Misrepresentation and Concealment in Insurance Loss Investigations 377-80
Secured Land Transactions 455-58

GRAND JURY

Immunity 591-616

HEARINGS

Initial Showing Prior to Challenge to Affidavit 967-70
Suppression of Evidence 963
Suppression Regardless of Materiality 968

HEARSAY

See EVIDENCE

Admissibility of Affidavits for Search Warrants 361-63

HIGHWAYS

See EMINENT DOMAIN

HOMESTEADS

Partition Action Involving Divorced Spouses 421

HOSPITALS

Hospital Board Decisions 458

IMMIGRATION

Bracero Program 661-62, 665
Causes of Increased Illegal Immigration 663-65
Cost of Illegal Aliens to Federal Government 668
Cost of Illegal Aliens to Local Government 669
Employment Exemption From Section 1324 of the Immigration and Nationality Act 671-78
Employer Sanctions on Employment of Illegal Aliens 674-78, 680-87
Farm Labor Contractor Registration Act 678
Federal Legislative Attemts to Curb Illegal Immigration 680-82
Immigration and Nationality Act 660-62, 671, 674-80
Impact of Illegal Immigration 665-70
Labor Certification Procedures for Illegal Aliens 671-73
"Operation Wetback" 661
Pending Federal Illegal Immigration Legislation: S. 2252 682-87
Preemption of State Legislative Attempts to Curb Illegal Immigration 679
State Legislative Attempts to Curb Illegal Immigration 679-81
Tax Revenues Lost Because Employers of Illegal Aliens Avoid Paying Taxes 667
Weaknesses of Present Illegal Immigration Law 670-78

INSURANCE

Change of Beneficiary: Presumption of Undue Influence 385-88
Credit Life Insurance: Proper Party to Bring Suit When Insurer Denies Liability 403-06
Misrepresentation and Concealment in Loss Investigation 377-80
Punitive Damages for Wrongful Refusal of First Party Claims 380-85
Specific Performance of Insurance Contract 399-402
Uninsured Motorist Coverage 388-99
Uninsured Motorist Coverage: Definition of the "Insured" 394-99
Uninsured Motorist Coverage: "Stacking" or Aggregation of Claims 389-94

INTERNAL REVENUE

Anti-Injunction Act 581-83
Filing Period for Redetermination of Tax Deficiency 752
Filing Period for Redetermination of Tax Deficiency: Date of Postmark 755-57
Filing Period for Redetermination of Tax Deficiency: Delivery Within Due Course of Mail 754-55
Filing Period for Redetermination of Tax Deficiency: Negligence of Governmental Official 754, 757-58

Filing Period for Redetermination of Tax Deficiency: Negligence of Tax Official ... 753
Jeopardy Assessments ... 562-64
Ninety Day Notice of Deficiency for Ordinary Assessments ... 561-62
Ordinary Assessments ... 561-62
Postseizure Hearing Adequate in Summary Assessment Proceedings ... 569-74
Procedural Safeguards Prior to Tax Reform Act of 1976 ... 574-78
Procedure and Source of Authority in Termination Assessments ... 564-67
Taxation of Political Campaign Organizations ... 911-50
Tax Reform Act of 1976 ... 567-69, 578-87
Termination Assessments ... 564-69

JOINT TENANTS

Concurrent Ownership ... 418-22

JUDICIAL REVIEW

See ENVIRONMENTAL LAW

Judicial Policymaking ... 781-85

JURIES

Jury Instructions: Beyond a Reasonable Doubt Standard ... 986-91
Jury Instructions: Pattern ... 992

JURISDICTION

See CIVIL PROCEDURE

Jurisdiction Under ERISA ... 250-53
Mississippi's Long-Arm Jurisdiction ... 461-63
Section 147 of the Mississippi Constitution ... 459-60

JUVENILES

Disparate Treatment of Juveniles and Adults ... 463-64

LABOR LAW

See ERISA

LABOR RELATIONS

Circumstances That Cause The Loss of Protection Under Section 7 of the NLRA: Disloyalty ... 869-71
Circumstances That Cause the Loss of Protection Under Section 7: Disruption of Business ... 873-74
Circumstances That Cause the Loss of Protection Under Section 7: Opprobrious, Egregious or Flagrant Conduct ... 875-76
Circumstances That Cause the Loss of Protection Under Section 7: Threats, Violence, or Illegal Conduct ... 874-75
Circumstances That Cause the Loss of Protection Under Section 7: Unreasonable Means to the End ... 871-73

Concerted Activity: Constructive Concerted Activity ... 844-45
Concerted Activity: Degree of Mobilization ... 849-50
Concerted Activity: Employer's Knowledge of the Concerted Activity ... 850-51
National Labor Relations Act: Concerted Activity ... 839-41
National Labor Relations Act: Employee Rights ... 840-41
Proper Objectives of Protected Concerted Activity: Compliance with Statutes ... 856-58
Proper Objectives of Protected Concerted Activity: Matters Outside the Participating Employee's Own Relationship with his Employer ... 860
Proper Objectives of Protected Concerted Activity: Mutual Aid and Protection ... 852-53
Proper Objectives of Protected Concerted Activity: Protecting the Discharge of Employee or Supervisor ... 858-60
Proper Objectives of Protected Concerted Activity: Safety Protests ... 854-56
Types of Protected Concerted Activities: Economic Pressure ... 864
Types of Protected Concerted Activities: Partial Strikes ... 865
Types of Protected Concerted Activities: Pursuing Established Procedures For Presenting Grievances ... 867
Types of Protected Concerted Activities: Right to Honor Lawful Picket Lines ... 863
Types of Protected Concerted Activities: Strikes ... 863-68
Types of Protected Concerted Activities: Symbolic Strikes ... 866
Types of Protected Concerted Activities: Wanton and Punitive Strikes ... 867-68

LANDLORD AND TENANT

Caveat Lessee ... 882-83
Common Law Rules Concerning Leases ... 882-84
Constructive Eviction ... 884-85
Eminent Domain: Apportionment of Damages of Leasehold ... 417-18
Implied Warranty of Habitability ... 886-900

LEGISLATURE

Regulation of Procedures For the Adoption of Local Court Rules ... 623-26
Veracity Challenges: "Flat Bans" ... 972

LIENS

Construction Liens ... 428-31

LOANS

Construction Liens: Lender's Priority ... 430-31
Construction Liens: Owner Protection ... 428-31
Credit Life Insurance: Proper Party to Bring Suit When Insurer Denies Liability ... 403-06

LOCAL GOVERNMENT

1977 Mississippi Supreme Court Decisions ... 465

MINERALS

Nature of Interest 422-23
Oil and Gas: Construction of Instruments of Transfer 423-24

MORTGAGES

Creditor Status of Mortgagee Not in Possession 509
Priority in Bankruptcy 505-17

NEGLIGENCE

Comparative Fault Principles in Admiralty Cases 495-504

NOTICE

See EMINENT DOMAIN

OIL AND GAS

Construction of Instruments of Transfer 423-24
Damage to Surface Estate by Lessee 424-25
Nature of Interest in Minerals 422-23

PARTITION

Divorced Spouses 421
Methods of Partition 422

PHYSICIANS AND SURGEONS

Hospital Board Decision 458

POLICE POWERS

Perjury 970
Protection Against Unreasonable Searches and Seizures 963

POLITICAL SCIENCE

Litigation as an Alternative to the Political Process 818

PRIVILEGES AND IMMUNITIES

Federal Transactional Immunity 598-605
Federal Witness Immunity: Statutory Procedure 606-09
Fifth Amendment Constitutionality of Federal Immunity Statues 602-05
Grand Jury Immunity in Mississippi 591-616
Witness Immunity in Mississippi 609-16

PROPERTY

See EMINENT DOMAIN; OIL AND GAS
Concurrent Ownership: Methods of Partition 422
Concurrent Ownership: Ouster of Cotenant 418-21
Concurrent Ownership: Partition Action Involving Divorced Spouses 421
Construction Liens: Lender's Priority 430-31

Construction Liens: Limitation on Enforcement 428-31
Construction Liens: Owner Protection 428-31
Conveyances: Fiduciary Relationship Between Grantor and Grantee 425-27
Conveyances: Reservation in Deed 427
Damage to Surface Estate by Lessee in Oil and Gas Lease 424-25

PUBLIC LAW LITIGATION

Prospective Decrees 771-72
Deliberately Fashioned Remedies 772-73
Environmental 769-818
Equity 771
Group Relief 770, 773
Judicial Restraint and Judicial Activism 775-76
Reapportionment 775-77
Segregation 773-74
Social Theories and Social Science 770-71

RETIREMENT LAWS AND PENSIONS

See ERISA

ROYALTIES

Nature of Interest in Minerals 422-23

SALES

Parol Evidence Rule 336-39
Warranty of Future Performance 339-41

SEARCH AND SEIZURE

Arrests with Warrants 626-33

SEARCH WARRANTS

Admissibility of Affidavits 361-63
Factual Inaccuracies 966

SECURED TRANSACTIONS

Attachment of Security Interest 341-43

SEPARATION OF POWERS

Judicial Encroachment on the Executive Branch 814-18
Judicial Encroachment on the Legislative Branch 814-18

STATUTE OF LIMITATIONS

Under ERISA 253-55

SUPREME COURT OF THE UNITED STATES

Judicial Policymaking 781-85

TAXATION

Campaign Expenditures versus Investment Expenses 929
Corporations: Criteria for Classifying Corporations for Tax Purposes 471-74, 487-90
Deductibilty of Campaign Expenses by Political Candidate 928-31
Deductibilty of Contributions by Business and Individuals 932-43
Deductibilty of Impartial Quasi-Political Contributions 942-43
Disposition of Unexpended Campaign Funds 925-26
Exempt Function Income 917-18
Gift Tax Aspects of Political Contributions 946-50
Income of Political Campaign Organization 917-21
Limited Partnerships: Centralization of Management Requirement 481-82, 488-89
Limited Partnerships: Characteristics 479-86
Limited Partnerships: Characteristic of Free Transferability of Interests 484-85, 489
Limited Partnerships: Continuity of Life Test 479-81, 488
Limited Partnerships: Corporation as Sole General Partner 470-71, 475-76
Limited Partnerships: Effect of Classification as an Association or Corporation 471-72, 477
Limited Partnerships: Effects of Tax Reform Act of 1976 490-94
Limited Partnerships: Limited Liability Aspect 482-83, 489
Limited Partnerships: Recent Decisions 476-79, 486-87
Limited Partnerships: Restrictive Requirements for the Issuance of Advance Rulings 474-76
Limited Partnerships: Tax Shelter 469-71
Mississippi Supreme Court Decisions, 1977 465-66
Political Campaign Organizations 912-15
The Political Candidate and Personal Taxability 923-32
The Political Contributor 932-46
Political Gifts 946-50
"Primary Purpose" Qualification Test for Tax-Exempt Status in Political Campaigns 916-17
Realization and Recognition of Income from Contributors 943-45

TENANCY IN COMMON

Concurrent Ownership 412-22

TITLE SEARCHES

Breaches of Duty 703-14
Breaches of Duty: Errors in Interpretation 710-12
Breaches of Duty: Failure to Find 708-10
Breaches of Duty: Failure to Report 712-14
Breaches of Duty: Failure to Search 704-08
Defenses 714-20
Defenses: Denial of Damages 717-18
Defenses: Denying the Breach of Duty 716-17
Defenses: Denying Duty 715-16

Defenses: Erosion of Defenses 718-20
Defenses: Limiting Liability 718-19
Duty to Advise 694-97
Duty to Advise as the Final Test 721-22
Perimeters of the Reasonable Search 720-21
Standard of Care 699-701
Theories of Duty 691-94
Theories of Recovery: Contract Theory 697
Theories of Recovery: Tort Theory 698-99

TORTS

Comparative Fault Principles in Admiralty Cases 495-504
Governmental Immunity 442-46
Landowner Liability: Negligence Liability to Invitees 440-42
Negligence Per Se in Automobile Cases 436-40
Res Ipsa Loquitor in Automobile Cases 434-36
Strict Products Liability in Admiralty Cases 495-504

UNDUE INFLUENCE

Change of Life Insurance Beneficiaries 385-88

UNIFORM COMMERCIAL CODE

See COMMERCIAL LAW

VENUE

Under ERISA 253-55

WORKMEN'S COMPENSATION

Final Report and Settlement Receipt (Form B-31) 309
Grandchild Treated as Child Under In Loco Parentis Doctrine 309-12
Statute of Limitations 303-09

ZONING

Inverse Condemnation 411-13

ARTICLES

By Authors

GUTHRIE T. ABBOTT
The Proposed Mississippi Rules of Civil Procedure—An Argument for Adoption 285

KENNETH W. BARTON AND RICHARD G. COWART
The Enigma of Hearsay 31

THOMAS D. BOURDEAUX AND CHARLES C. PEARCE
Contents of Writings, Recordings, and Photographs 197

REGINALD A. GRAY, JR. AND S. ROBERT HAMMOND, JR.
Opinion and Expert Testimony 1

FRANK J. HAMMOND, III
Jeopardy and Termination Assessments Under the Tax Reform Act of 1976—Do They Meet Constitutional Due Process Requirements? 559

JUDITH J. JOHNSON
Protected Concerted Activity in the Non-Union Context: Limitations on the Employer's Rights to Discipline or Discharge Employees 839

JOHN MOELLER
Environmental Litigation: Prevailing Values Over Enduring Principles? 769

WILLIAM A. MOGEL
Award of Attorneys' Fees in Administrative Proceedings—Is It in the Public Interest? 271

F. HODGE O'NEAL
Preventive Law: Tailoring the Corporate Form of Business to Ensure Fair Treatment of All 529

RICHARD T. PHILLIPS
Civil Litigation Under the Employee Retirement Income Security Act of 1974 241

L. ARNOLD PYLE AND DAVID W. MOCKBEE
Authentication and Identification 151

MICHAEL B. WALLACE AND KENNETH G. STAMPS
Corporate Free Speech and Campaign Finance in Mississippi 819

ARTICLES

By Title

Authentication and Identification
L. Arnold Pyle and David W. Mockbee 151

Award of Attorneys' Fees in Administrative Proceedings—
Is It in the Public Interest? ..... *William A. Mogel* 271

Civil Litigation Under the Employee Retirement Income
Security Act of 1974 ..... *Richard T. Phillips* 241

Contents of Writings, Recordings, and Photographs
Thomas D. Bourdeaux and Charles C. Pearce 197

Corporate Free Speech and Campaign Finance in
Mississippi ..... *Michael B. Wallace and Kenneth G. Stamps* 819

The Enigma of Hearsay .... *Kenneth W. Barton and Richard G. Cowart* 31

Environmental Litigation: Prevailing Values Over
Enduring Principles? ..... *John Moeller* 769

Jeopardy and Termination Assessments Under the Tax
Reform Act of 1976—Do They Meet Constitutional
Due Process Requirements? ..... *Frank J. Hammond, III* 559

Opinion and Expert Testimony
Reginald A. Gray, Jr. and S. Robert Hammond, Jr. 1

Preventive Law: Tailoring the Corporate Form of
Business to Ensure Fair Treatment of All ..... *F. Hodge O'Neal* 529

The Proposed Mississippi Rules of Civil Procedure—
An Argument for Adoption ..... *Guthrie T. Abbot* 285

Protected Concerted Activity in the Non-Union
Context: Limitations on the Employer's Rights to
Discipline or Discharge Employees ..... *Judith J. Johnson* 839

COMMENTS

Federal Taxation of Political Campaign Organizations
W. Eugene Magee 911

Grand Jury Immunity in Mississippi ..... *Alan Barner Cameron* 591

Illegal Immigration: Short-Range Solution of
Employer Sanctions ..... *Margaret Alice Hegman* 659

In Search of a Habitable Home in Mississippi
Deborah Hodges Bell and Lydia Hodges Suffling 881

The Proposed Criminal Rules of Circuit Court Practice:
A Selective Analysis ..... *Rowland H. Geddie III* 617

Title Searches: The Potential for Liability
Albert De Sha Malone 689

The Viability of a Tax Shelter Vehicle: Limited Partnerships with a Corporation as Sole General Partner ..... *Norman Craig Brewer* 469

1977 MISSISSIPPI SUPREME COURT REVIEW

Introduction 301
Boards and Commissions ..... *Mary Elizabeth Barrett* 302
Corporations and Commercial Law ..... *Eddie Clark Williams* 319
Criminal Law and Evidence ..... *Cecile Champion Edwards and Peyton Prospere* 344
Domestic Relations ..... *Jimmie D. Marshall* 365
Insurance ..... *Mark D. Herbert* 377
Property ..... *Moran McLelland Pope, III* 408
Torts ..... *Bryan C. Harbour* 433
Miscellaneous ..... *Richard Edwin Ulner* 447

RECENT DECISIONS

ADMIRALTY

Strict Products Liability—Comparative Fault Principles Applicable to Strict Products Liability Actions in Admiralty (*Pan-Alaska Fisheries, Inc. v. Marine Construction and Design Co.*, 9th Cir. 1978) ..... *James T. Milam* 495

ANTITRUST

Sherman Act—Parker Doctrine Exemption Available to Political Subdivision Only When Subdivision Is Acting Within the Ambit of State Legislative Intent (*City of Lafayette v. Louisiana Power & Light Co.*, U.S. 1978) ..... *Allan P. Bennett* 725

CONSTITUTIONAL LAW

Due Process—Foster Parents Have No Liberty Interest in Foster Children (*Drummond v. Fulton County Department of Family & Children's Services*, 5th Cir. 1977) ..... *Wayman Dal Williamson* 518

Search and Seizure—Fourth Amendment Requires Veracity Hearing at Defendant's Request to Challenge Facts Underlying Facially Sufficient Affidavit (*Franks v. Delaware*, U.S. 1978) ..... *Trudy Lumpkin* 962

FEDERAL JURISDICTION

Abstention—Judicial Economy (*Will v. Calvert Fire Insurance Co.*, U.S. 1978) ..... *J. Philip Jones* 951

Class Actions—Orders Relating to Class Certification Not Appealable Under 28 U.S.C. § 1291 Prior to Final Judgment (*Coopers & Lybrand v. Livesay*, U.S. 1978) ..... *J. Harbour Mounger* 973

INTERNAL REVENUE CODE

Sections 6213 and 7502—Conduct of Government Employees Will Not Defeat an Otherwise Timely Filing for Income Tax Redetermination (*Curry v. Commissioner*, 4th Cir. 1978) ..... *Anna Furr* 752

JURISDICTION AND VENUE

Valid Default Judgment Requires Bona Fide Effort to Serve Defendant in County of Suit (*Gillard v. Great Southern Mortgage & Loan Corp.*, Miss. 1978) ..... *R. Barry Cannada and Douglas E. Levanway* 739

JURY INSTRUCTIONS

Reasonable Doubt—"Don't Have to Know" Instruction Is Not Reversible Error When Conviction Is Based on Direct Evidence (*Bell v. State*, Miss. 1978) ..... *Thomas E. Williams* 985

MORTGAGES

Priority in Bankruptcy—Mortgagee Not in Possession A General Creditor (*In re Golden Enterprises, Inc.*, 4th Cir. 1977) ..... *Harry Edward Neblett, Jr.* 505

BOOKS REVIEWED

BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING by Robert Gorman
Reviewed by *W. Gary Vause* 235

HANDLING MISDEMEANOR CASES by F. Lee Bailey and Henry L. Rothblatt
Reviewed by *Harvey H. Chamberlin* 761

NEITHER CRUEL NOR UNUSUAL: THE CASE FOR CAPITAL PUNISHMENT by Frank Carrington
Reviewed by *Tommy W. Rogers* 767

THE PLAINTIFF'S PERSONAL INJURY CASE: ITS PREPARATION, TRIAL AND SETTLEMENT by John A. DeMay
Reviewed by *E. C. Stuart, Jr.* 238

TABLE OF CASES

Cases in italics are the subject of a Recent Decision, Comment or Article

Aberdeen and Rockfish Railroad v. Students Challenging Regulatory Agency Procedures (Scrap II) 798
Academy Spires, Inc. v. Brown ..892, 896
Acosta v. State 174
Aeschliman v. Nuclear Regulatory Comm'n 794, 801
Aetna State Bank v. Altheimer . 952
Aguilar v. Texas 629
Alabama Great S.R.R. v. Shannon 63
Albertson v. Subversive Activities Control Bd. 600, 601
Alleluia Cushion Co. 845
Allgeyer v. Louisiana 519
Alyeska Pipeline Service Co. v. Wilderness Society 271-76, 278, 283
American Mut. Reinsurance Co. v. Calvert Fire Ins. Co. 951
Anderson v. Sills 164
Anderson v. State 40
Anschul v. Sitmar Cruises 981
Arkansas Motor Coaches, Ltd. v. Commissioner 755
Armstrong v. State 643-44
Associated Co. v. Greenhut 511
Atlantic Life Ins. Co. v. Serio 400
Auerbach v. United States 170
Avera v. Avera 427
Azzaro v. Harnett 257
Baker v. Carr 745
Baldwin v. State 635
Bank of Holly Springs v. Pinson 533
Barber v. Page 131
Barham v. Nowell 179
Barnes v. Taylor 434-36, 446
Bates v. State Bar 732
Bartlett & Co., Grain v. Merchants Co. 71
Beck v. Ohio 639
Bell v. State (Miss. 1978) 985-93
Benderoff v. United States 546
Berry v. Hinds County 443-45
Bindseil v. Liberty Trust Co. .. 511
Blachly v. United States 220
Blackmon v. Blackmon 421
Board of Supervisors v. Bailey .. 620
Bond v. City of Moss Point 906
Boston Hous. Auth. v. Hemingway 890-91
Bourne v. State 988
Boyett v. Boyett 371
Brabham v. Brabham 372
Brady v. John Hancock Mut. Life Ins. Co. 449-52
Brady v. Maryland 642
Brillhart v. Excess Ins. Co. of America 956
Brinegar v. United States 962
Broadhead v. Stone 207
Broser v. Royal Abstract Corp. . 718
Brown v. Board of Education (Brown I) (Brown II) ...771, 774
Brown v. Chalk 905
Brown v. F.W. Woolworth Co. .. 305
Brown v. Gravlee Lumber Co. 429-30
Brown v. Southall Realty Co. ... 902
Brown v. State 987
Brown v. Walker 598-600
Brown Shoe v. United States . 977-78
Bryant v. Lovitt 746-47, 750
Buckley v. Valeo 820
Bullock v. Fairburn 437-40
Burford v. Sun Oil Co. 954
Burley v. Kuykendall 422
Butaud v. Suburban Marine & Sporting Goods 499
Butner v. Golden Enterprises, Inc. (4th Cir. 1977) 505-17
Byrnes v. Sparrow 708
Calero-Toledo v. Pearson Yacht Leasing Co. 572
California v. Green 44
California v. Green 130
Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n. 781

Canon v. United States 586
Cantor v. Detroit Edison 730-32
Capital Bank v. Trust Co. v. Core 704, 716
Carlisle v. State 45
Carolina Transformer Co. v. Anderson 319
Causey v. Norwood 904
Central Paper Co. v. Commissioner 754
Chambers v. Mississippi 140-43
Charleston Nat'l Bank v. Hennessy 93
Chavis v. Martin 704
Chears Floor & Screen Co. v. Gidden 428
Chestnut v. Ford Motor Co. 57, 65
Chicago R.R. v. Provine 86
Chimel v. California 626
Cinderella Foods, Div. of Steven Indus., Inc. v. Miller 160
C.I.T. Financial Serv. Corp. v. First Nat'l Bank 341
Citizens Nat'l Bank v. First Nat'l Bank 325
Citizens Nat'l Bank v. Waltman 333
Citizens to Preserve Overton Park v. Volpe 791-92
City of Jackson v. Desoto, Inc. 465-66
City of Lafayette v. Louisiana Power & Light Co. (U.S. 1978) 725-38
Clark v. Campbell 565
Clark v. Carter 423
Clay v. State 639
Cogollos v. Cogollos 250
Cohen v. Beneficial Loan Corp. 976
Cohen v. Virginia 952
Cole v. United States 34-35
Colorado River Water Conservation Dist. v. United States 958
Coker v. Georgia 351-52
Cobbledick v. United States 974
Colley v. Standard Oil Co. 162
Collins v. Slocum 711
Commissioner v. Shapiro (U.S. 1976) 582-83, 585
Cone Mill Corp. v. NLRB 864
Coney v. Coney 51
Conservation Council v. Froehlke 793
Conway v. Dana 375
Cook v. Citizens Sav. & Loan Ass'n. 430-31
Cooper v. State 631-32
Coopers & Lybrand v. Livesay (U.S. 1978) 973-74, 983-84
Corn v. State 353
Counselman v. Hitchcock 598
County of Allegheny v. Frank Mashuda Co. 955
County of Suffolk v. Secretary of Interior 815
In re Cox 512
Craig v. Superior Court 648
Crawford v. Seaboard Coast Line R.R. 957
Crawford v. State 226
Croll v. John Hancock Mut. Life Ins. Co. 180
Crook v. Chilvers 708
CTS Corp. v. Piher Int'l Corp. 210
Cuff v. Gleason 244
Curry v. Commissioner (4th Cir. 1978) 752-59
Curtiss Candy Co. v. Johnson 191
Cutshall v. State 77
Dallas County v. Commercial Union Assurance Co. 102, 122-23, 125
Daniel v. International Bhd. of Teamsters 260-61
Dapkunas v. Cagle 891, 900
Dawson Cabinet Co. 894
Day v. Gibralter Oil Corp. 424
DeCanas v. Bica 679-80
Diagnostic Center Hosp. Corp. 848
Dickinson v. Petroleum Conversion Corp. 977
Dippel v. Sciano 500
Dobbs House, Inc. v. NLRB 872
Dodd v. Williams 705
Donahue v. Rodd Electrotype Co. 534
Donnelly v. United States 141
Doonis v. Mutual Title Co. 718
Douglas v. Title Trust Co. 717

Drummond v. Fulton County Dept. of Family & Children's Serv. (5th Cir. 1977) 518-27
Duke & Co. v. Forester 734
East Texas Motor Freight Sys. Inc. v. Rodriguez 984
Eaton v. State 644
Eaves v. Penn 267-68
Edmiston v. Schellenger 378-80
Edwards v. Roberts 334
Eisen v. Carlisle & Jacquelin (Eisen I) 978-81
Eisen v. Carlisle & Jacquelin (Eisen II) 978-81
Eisen v. Carlisle & Jacquelin (Eisen III) 978-81
Eisen v. Carlisle & Jacquelin (Eisen IV) 978-81
Emporium Capwell Co. v. Western Community Organization 861
Enochs v. Williams Packing & Navigation Co. 582-83
Environmental Defense Fund, Inc. v. Corps of Engineers (Gillham Dam I) 790
Environmental Defense Fund, Inc. v. Corps of Engineers (Gillham Dam II) 789
Environmental Defense Fund, Inc. v. Froehlke 790
Environmental Defense Fund, Inc. v. Hoffman 792-93
Environmental Defense Fund, Inc. v. Ruckleshaus 787
Espinoza v. Farah Mfg. Co. 686
Evans v. State 613
Ewton v. Employees' Profit Sharing Retirement Plan of Hubbard 253-54
Fair v. Negley 899
Fallen v. United States 757
Farmers' Bank v. Douglass 53
Fayard v. Fayard 548
FCC v. Pacifica Foundation 828
Federal Chem. Co. v. Jennings 217
Fells v. State 47
Fells v. State 358-61
Fiberman v. Cook 245
Fidelity Bankers Life Ins. Co. v. Williams 513
First Nat'l Bank v. Bellotti (U.S. 1978) 820
First Nat'l Bank v. NLRB 866
Fleischmann Distilling Corp. v. Maier Brewing Co. 271
Flint Ridge Dev. Co. v. Scenic Rivers Ass'n. 800
Flora v. United States 576
Foisy v. Wyman 898
Fondren v. State Tax Comm'n. 466
Ford v. Jones 423
Forgay v. Conrad 975
Forrest v. State 986
Foster v. Foster 467
Fowler v. Fisher 467
Franks v. Delaware (U.S. 1978) 963
Freedman's Sav. & Trust Co. v. Shepherd 506-08
Frisbie v. Collins 626, 633
Fuentes v. Shevin 571
Fulkerson v. Holmes 113
Furman v. Georgia 345-47
Fuqua v. State 639
G. & M. Merriam Co. v. Syndicate Publishing Co. 122
G. & W. Elec. Specialty Co. v. NLRB 852
G.V.R., Inc. 847
Gardner v. Westinghouse Broadcasting Co. 984
Gardner v. Wood 693, 713
Garrison v. Maggio 642
In re Gault 523
Gerstein v. Pugh 585
Gillard v. Great S. Mortgage & Loan Corp. (Miss. 1978) 739-40, 749-50
Gillard v. Great S. Mortgage & Loan Corp. 296
Gillespie v. Southern Farm Bureau Cas. Ins. Co. 397-99
Gillespie v. United States Steel Corp. 977
Gilmore v. United States 91
Gleason v. Title Guarantee Co. 695, 702, 704
Glyco v. Schultz 903

Glyn v. Title Guarantee & Trust Co. 713
Goldfarb v. Virginia State Bar 730, 732, 734
Gomez v. Perez 453
Goode v. Castlewood Arms, Inc. 907
Gosa v. Securities Inv. Co. 980
Gray v. State 344, 348-50
Green v. Superior Court 888
Green v. Wolf Corp. 979
Gregg v. Georgia 346-47
Greene County Planning Bd. v. FPC 273, 276, 278
Grenada Cotton Compress Co. v. Atkinson 85
Griffin v. State 614-15
Griswold v. Connecticut 777
Gulf Coast Drilling & Exploration Co. v. Permenter 619-20
Gulf, Mobile & Ohio R.R. v. Golden 160
Gulf Oil Corp. v. Thatch 74
Hackett v. General Host Corp. 980
Hadley Realty Corp. v. Lawyer Title Corp. 706
Ham v. Ham 426
Hamilton v. McGill 456-58
Handshoe v. Daly 41
Haney v. State 62
Haralson v. State 621
Harris v. Harris 366-68, 370
Hurst v. State 172
Hartford Accident & Indem. Co. v. Bridges 392-94
Hayes v. State 361-63
Henning & Cheadle, Inc. v. NLRB 873
Herbst v. ITT 981
Hewlett-Packard Co. v. Barnes 257-58
Hibernia Bank v. International Bhd. of Teamsters 249
Hickey v. Anderson 51
Hickman v. Taylor 652
Highway Dev. Co. v. Mississippi State Highway Comm'n. 409
Highway Dev. Co. v. Mississippi State Highway Comm'n. 324
Hiller v. Wiley 884
Hines v. Davidowitz 679
Hinton v. Sims 639-40
Hobson v. Hansen 773
Hodges v. Hilton 905
Holt v. State 361-63
Hooley v. Red Carpet Corp. 980
Houston Contracting Co. v. Atkinson 63
Houston v. Interstate Circuit 208
Houston-New Orleans, Inc. v. Page Eng'ring Co. 502
Hudson v. Belzoni Equip. Co. 535
Hugh H. Wilson Corp. 847
Humboldt Bldg. Ass'n Co. v. Ducker's Executrix 702, 707
Hunt Tool Co. 847
Illinois Cent. Gulf R.R. v. Stedman 436-37
In re Cox 512
In re Gault 523
In re Pittsburgh-Duquesne Dev. Co. 511
In re Thomas 512
In re Wakey 511
In re Wilder 463-64
In re Yarber 366
Indiana Cotton Oil Co. v. Crowley 745
Inland Steel Co. v. NLRB 242
Insurers' Action Council, Inc. v. Heaton 259
International Harvester Co. v. Ruckelshaus 794
International Shoe Co. v. Garfinkle 620
Interstate Restaurants, Inc. v. Halsa Corp. 899
Irving v. Gray 565
Jack v. Kansas 599
Jack Cole-Dixie Highway Co. v. Red Ball Motor Freight, Inc. 550
Jackson v. Hooper 541
Jackson v. State 344, 347-49
Jarchow v. Transamerica Title Ins. Co. 720
Jarrell v. Hartman 892
Javins v. First Nat'l Realty Corp. 887

Jeanette Corp. 870
Jencks v. United States 645
Jett v. Commonwealth 42
Joanna Cotton Mills Co. v. NLRB 841-42
Johnson v. Crisler 719
Jolly v. State 136
Johnson v. Robinson 834
Jones v. Harris 557
Jones v. McCormick 184
Jones v. Millsaps 904
Jones v. State 987
Jones v. Superior Court 648
Joseph v. Greater New Guide Baptist Church, Inc. 711
Juare v. Nardin 82
Jackson Municipal Airport Auth. v. Wright 411-12
Kaiser Eng'r v. NLRB 853
Kastigar v. United States (U.S. 1972) 602-05
Kellum v. State 615-16
Kelly v. King 51, 149
Kent v. State 989
Kerbow v. Kerbow 249-50
Kiernan v. Germain 905
King v. Moorehead 892
King v. State *ex rel.* Murdock Acceptance Corp. 179
King v. State *ex rel.* Murdock Acceptance Corp. 87
King v. State *ex rel.* Murdock Acceptance Corp. 202
Klein v. Walston & Co. 957
Kleppe v. Sierra Club 800
Knowles v. State 645
Korn v. Franchard Corp. 979
Kotz v. United States 464
Labine v. Vincent 454-55
Landstreet v. Meyer 535
Laing v. United States 566
Landis v. North Am. Co. 956
Larson v. Commissioner 476-87
Lawall v. Groman 715
Lee v. State 143
Lemle v. Breeden 887
Lennep v. Mississippi State Highway Comm'n. 417-18
Leslie Metal Arts. Co. 859
Lewis Hall Iron Works v. Blair 753
Lilburn Trial 593
Lincoln County v. Luning 733
Lincoln Nat'l Life Ins. Co. v. Crews 382-85
Lindsey v. Norment 885
Lloyd v. Jefferson Davis Memorial Hosp. 458
Logan v. Aetna Cas. & Sur. Co. 389
Longleaf Forest Products, Inc. v. Hopkins 311
Longview Furniture Co. 876
Loretto v. United States 586-87
Louisiana Oil Corp. v. Rayner 904
Louisiana Power & Light Co. v. City of Thibodeux 955
Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co. 91
Lyons v. Westinghouse 960
McCaskill v. State 61, 64
McClellan v. Corland 952
McKeiver v. Pennsylvania 524
McLean v. Green 459-60
McLeod v. Bridges 187
McMahon v. McMahon 456-57
McQuade v. Stoneham 539
Magee v. Griffin 447-48
Maggio v. Abstract Title & Mortgage Corp. 717
Mansell v. Gross 426-27
Mapp v. Ohio 964
Marini v. Ireland 887
Marshall v. Chase Manhattan Bank 252-53
Marshall v. Synder 266-67
Martin v. Bankers Trust Co. 251-52
Martin v. State 631-32
Martin v. State 62
Mason v. Shook 51
Masonite Corp. v. International Woodworkers 64
Mathews v. Eldridge 523
Matthews v. State 620
Mattox v. State 644-45
Mattox v. United States 148-49
McDonald v. Commissioner 928
Meaney v. United States 71

Meaney v. United States 72
Meek v. Perry 60
Merchants' & Mechanics' Bank v. Sewell 512
Menke v. Thompson 243
Mercantile Nat'l Bank v. Langdeau 977
Mercy Regional Medical Center v. Doiron 440-42
Meredith v. City of Winter Haven 955
Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware 245
Merritt v. State 354-57
Messina v. New York Life Ins. Co. 9
Metzler v. State 633
Meyer v. Nebraska 519
Mid-Continent Nat'l Bank v. Bank of Independence 329
Middleton v. United Aircraft Corp. 497
Millbridge Apartments v. Linden 896
Miller v. Glendale Equip. & Supply, Inc. 462-63
Miller v. Standard Nut Margarine 582
Minnesota Pub. Interest Research Group v. Butz 795
Miranda v. Arizona 40, 49
Mississippi Cottonseed Prod. Co. v. Stone 449
Mississippi State Highway Comm'n. v. Arndt 410
Mississippi State Highway Comm'n. v. Aultman 418
Mississippi State Highway Comm'n. v. Blackwell 410
Mississippi State Highway Comm'n. v. Frierson 410
Mississippi State Highway Comm'n. v. Hillman 408-09
Mississippi State Highway Comm'n. v. Prescott 414
Mississippi State Highway Comm'n. v. Rives 416
Mississippi State Highway Comm'n. v. Robertson 413
Mississippi State Highway Comm'n. v. Tomlinson 412-13
Mississippi State Highway Comm'n. v. Waller 416-17
Mitchell v. W.T. Grant Co. 571-72
Mladinich v. Kohn 461, 463
Montana Power Co. v. Federal Power Comm'n 114
Moore v. City of East Cleveland 521
Morea v. State 620
Morrissey v. Commissioner 472
Morrissey v. Curran 251
Mortgage Loan Co. v. Livingston 506, 513
Mottolese v. Kaufman 956
Moyer v. Kirkpatrick 244
Murdock v. City of Jacksonville 733
Murphy v. Campbell Soup Co. 191
Murphy v. Inexco Oil Co. 253
Murphy v. State 990
Murphy v. Waterfront Comm'n 600-01
Mushroom Transp. Co. NLRB 843
Mutual Life Ins. Co. v. Hillman 68-70
Myers v. United States 205
NAACP v. Button 827
National Hosp. Ass'n 871
National Life & Accident Ins. Co. v. Parkinson 695, 717
National Old Line Ins. Co. v. Brownlee 400-02
Natural Resources Defense Council, Inc. v. Morton 786
Natural Resources Defense Council v. Nuclear Regulatory Comm'n 787, 794
Nedd v. United Mine Workers of America 260
Neilson v. Bromer 14
Newell v. State 285-87, 618-24, 657
Newman v. Dow 91
Newman v. Piggie Park Enterprises, Inc. 269
NLRB v. Buddies Supermarkets, Inc. 846
NLRB v. Fansteel Metallurgical Corp. 875

NLRB v. Interboro Contractors, Inc. ... 845
NLRB v. Knuth Bros., Inc. ... 869
NLRB v. Northern Metal Co. ... 845
NLRB v. Red Top, Inc. ... 875
NLRB v. Sutherland Lumber Co. 874
NLRB v. Union Carbide Corp. ... 843
NLRB v. Washington Aluminum Co. ... 861, 872
Noble v. Logan-Dees Chevrolet-Buick, Inc. ... 208
Nobles v. State ... 989
Noel v. United Aircraft Corp. ... 497
Nolan v. Meyer ... 245
Norman v. ARCS Equities Corp. ... 264
North Georgia Finishing, Inc. v. Di-Chem, Inc. ... 572
Northern Sec. v. United States ... 726-27
O'Bean v. State ... 630
Odom v. Luehr ... 39
Olsen v. Smith ... 727
Owen v. Neely ... 721
P. Beiersdorf & Co., Inc. v. McGohey ... 956
PPG Indus., Inc. v. Continental Oil Co. ... 958
Paine v. Ludlam ... 551
Palmer v. Chamberlain ... 552
Palmer v. Hoffman ... 82-83
Palmer v. Nissen ... 716
Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., (9th Cir. 1977) ... 495-504
Park West Management Corp. v. Mitchell ... 896
Parker v. Brown ... 728-38
Parkinson v. April Indus., Inc. ... 981
Parkman v. Mississippi State Highway Comm'n ... 292
Paulk v. Housing Auth. ... 411
Paymaster Oil Mill Co. v. Mitchell ... 338
Pass v. Pass ... 453-54
Pearl River Valley Water Supply Dist. v. Brown ... 411
Pearl River Valley Water Supply Dist. v. Wood ... 409
People v. District Court ... 653
People v. Gansley ... 824
Pesikoff v. Secretary of Labor ... 672
Peters v. State ... 622
Peterson v. United States ... 130
Phillips v. Commissioner ... 570, 573
Piccirillo v. New York ... 602
Pines v. Perssion ... 886
Pinkston v. Arrington ... 694
Pintard v. Martin ... 333
Pitts v. State ... 989
In re Pittsburgh-Duquesne Dev. Co. ... 511
Planters' Lumber Co. v. Thompkins ... 428
Plaza Amusement Co. v. Rothenberg ... 904
Pollack v. Sampsell ... 508
Posnanski v. Hood ... 886
Prewitt v. State ... 21
Progressive Cas. Ins. Co. v. Keys ... 382
Pruett v. Mississippi Valley Title Ins. Co. ... 696
Prudhomme v. Superior Court ... 648
Pryor v. State ... 988
Pugh v. Holmes ... 897
Pye v. Department of Transp. ... 788
Quates v. Griffin ... 419-20
Queen Caroline's Case ... 147
Radio Station WOW v. Johnson ... 975
Railroad Comm'n v. Pullman Co. ... 953
Ralston Purina Co. v. Rooker ... 336
Ramirez v. State ... 656
Randolph Div., Ethan Allen, Inc. v. NLRB ... 846
Rappaport v. Commissioner ... 756
Ray v. State ... 199
Realty Acceptance Corp. v. Montgomery ... 544
Republic Natural Gas Co. v. Oklahoma ... 977
Reste Realty Corp. v. Cooper ... 886
Rhode Island Comm. on Energy v. GSA ... 276-77

Rias v. Henderson 452-55
Ricks v. Bank of Dixie 331
Robinson v. Williams 183
Rodgers v. Rodgers 371
Roviard v. United States 643, 653
Rugendorf v. United States 966
Rutland v. Swift Chem. Co. 339
Southern Steamship Co. v. NLRB 874
Southwestern Bell Tel. Co. 873
Sabatino v. Curtiss Nat'l Bank 82-83
Saenger Amusement Co. v. Murray 190
San Antonio Independent School Dist. v. Rodriguez 778
Sanitary Grocery Co. v. Snead 57
Standard Brands, Inc. 850
Sauer v. State 987
Scenic Hudson Preservation Conference v. FPC 783
Schade v. Gehner 715
Schatle v. International Alliance 252
Schwartz v. Romneo 823
Scott v. State 622
Seago Enterprises, Inc. v. Mississippi State Highway Comm'n 418
Seals v. St. Regis Paper Co. 51
Sears v. State 633
Sewell v. Royal 898
Sheffield v. Reece 632
Shepard v. United States 69, 138
Sierra Club v. Lynn 275
Sierra Club v. Morton 784, 797
Silva v. Lynn 786
Simmons v. State 227
Simon v. Dixie Greyhound Lines, Inc. 60
Sisk v. State 362
Skolski v. Commissioner 755
Smith v. Hinton 386-88
Smith v. Mississippi Employment Security Comm'n 316
Smith v. State 635
Smith v. Temco, Inc. 461-62
Smith v. Organization of Foster Families for Equality & Reform 521
Smith v. State 987
Sniadach v. Family Fin. Corp. 570-71
Schooner Catherine v. Dickinson 500
Southern Farm Bureau Cas. Ins. Co. v. Roberts 392
Southern Pac. Lumber Co. v. Reynolds 619
Speed Mechanical, Inc. v. Taylor 308
Stampley v. State 46
Standard Coffee Co. v. Carr 63
Standard Ins. Co. v. Anderson 378
Standard Life Ins. Co. v. Veal 383-85, 404-06
Stanley v. Illinois 520
Starks v. State 64
State v. Bates 612
State v. Lewenthall 225
State Farm Mut. Auto. Ins. Co. v. Bishop 392
State Farm Mut. Auto Ins. Co. v. Stewart 40-41
Steele v. Mack 419-21
Stein v. Bowman 111-12
Stevens v. Marks 601
Stevens v. United States Fidelity & Guar. Co. 396-99
Students Challenging Regulatory Agency Procedures v. United States (Scrap II) 789
Stuyvesant Ins. Co. v. Motor Sales Co. 404
Supreme Instruments Corp. v. Lehr 440
Swann v. Charlotte-Mecklenburg Bd. of Educ. 771
Swift & Co. v. Compania Columbiana Del Caribe 977
Swift & Co. v. Hawkins 191
Sylvan v. Commissioner 756
Talbot v. State Farm Mut. Auto. Ins. Co. 392
Tallahatchie Home Bank v. Aldridge 334
Tallahatchie Lumber Co. v. Cecil Lumber Co. 220
Tapp v. State 354, 356-58
Taylor v. Taylor 373-74, 376

Teamsters v. United States 683-84
Tennessee Valley Auth. v. Hill 770
Texas Pac. Oil Co. v. Holder 424-25
In re Thomas 512
Thomas v. Hogan 79
Thomas v. Schee 713
Thompson v. Shoemaker 885
Thompson v. State 142-43
Thorne v. Johnson 696
Tisdale v. Jefferson Standard Life Ins. Co. 99
Throckmorton v. Holt 68
Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd. 211
Torrence v. State 636-37
Trimble v. Gordon 455
Turk v. Benson 706
Turner v. Bell 706
Tyler v. Powell 63
Ulmann v. United States 600
Union Producing Co. v. Pittman 425
United Airlines, Inc. v. McDonald 980, 984
United States v. Addison 170
United States v. Agurs 642
United States v. Annunziato 69
United States v. Articles . . . Provimi 29
United States v. Belcufine 969
United States v. Brown 19
United States v. Brunett 965
United States v. Burr 595
United States v. Butcher 5
United States v. California 736
United States v. Cantu 675
United States v. Carmichael 967
United States v. Carolene Prod. Co. 769
United States v. Carranco 79
United States v. De Sisto 43
United States v. Estremera 646
United States v. FMC Corp. 76
United States v. Farris 185
United States v. Garson 640
United States v. Green 13
United States v. Hall 566-67
United States v. Halsey 967
United States v. Isabella 757
United States v. Jenkins 170
United States v. Kintner 473
United States v. Leal 186
United States v. Lopez 675
United States v. McKeever 171
United States v. Matot 65
United States v. McDaniel 605
United States v. Medico 126
United States v. Moreno 677
United States v. Mount Fuji Japanese Steak House, Inc. 675
United States v. Napier 58-59
United States v. Nobles 647
United States v. Orejel-Tejeda 677
United States v. Pfeiffer 84
United States v. Pheaster 70
United States v. Reliable Transfer Co. 501, 503
United States v. Rodriguez 210
United States v. Ross 34
United States v. Smith 6
United States v. Students Challenging Regulatory Agency Procedures (Scrap I) 784
United States v. Thomas 968
United States v. West Peachtree Tenth Corp. 684
United States v. Williams 18, 19
United States v. Wingard 183
Upshaw v. State 344, 350-52
Usery v. Wilson 263-64
Van Riper v. United States 169
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. (U.S. 1978) 780, 801
Virginia v. West Virginia 105
Wacek v. Frink 708
Wadsworth v. Whaland 258-59
In re Wakey 511
Wardius v. Oregon 647
Watson v. Calvert Bldg. & Loan Ass'n 692
Weagley v. Colonial Baking Co. 173
Weber v. Aetna Cas. & Sur. Co. 452-53
Weeks v. United States 963

Wheat v. State 611-12
White v. Inman 176
Wiggins v. State 163
Wild v. Bass 22
In re Wilder 463-64
Will v. Calvert Fire Ins. Co. (U.S. 1978) 952
Williams v. Brickell 229
Williams v. Florida 646-47
Williams v. Rhodes 834
Willoughby v. State 165
Wlodarek v. Thrift 704
Wofford v. Cities Serv. Oil Co. 746, 749-50
Wolf v. Colorado 963
Wong Sun v. United States 638
Wood v. State 7, 352-53
Woodbury v. McClurg 538
Woodson v. North Carolina 346-47
Wooldridge v. Wilkins 218
Wright v. Jackson Mun. Airport Auth. 412
Wright v. Tatham 35
Wyatt v. Stickney 772
In re Yarber 366
Yazoo & M.V.R.R. v. Levy & Sons 106, 207
Zuckman v. United States 476, 479-87

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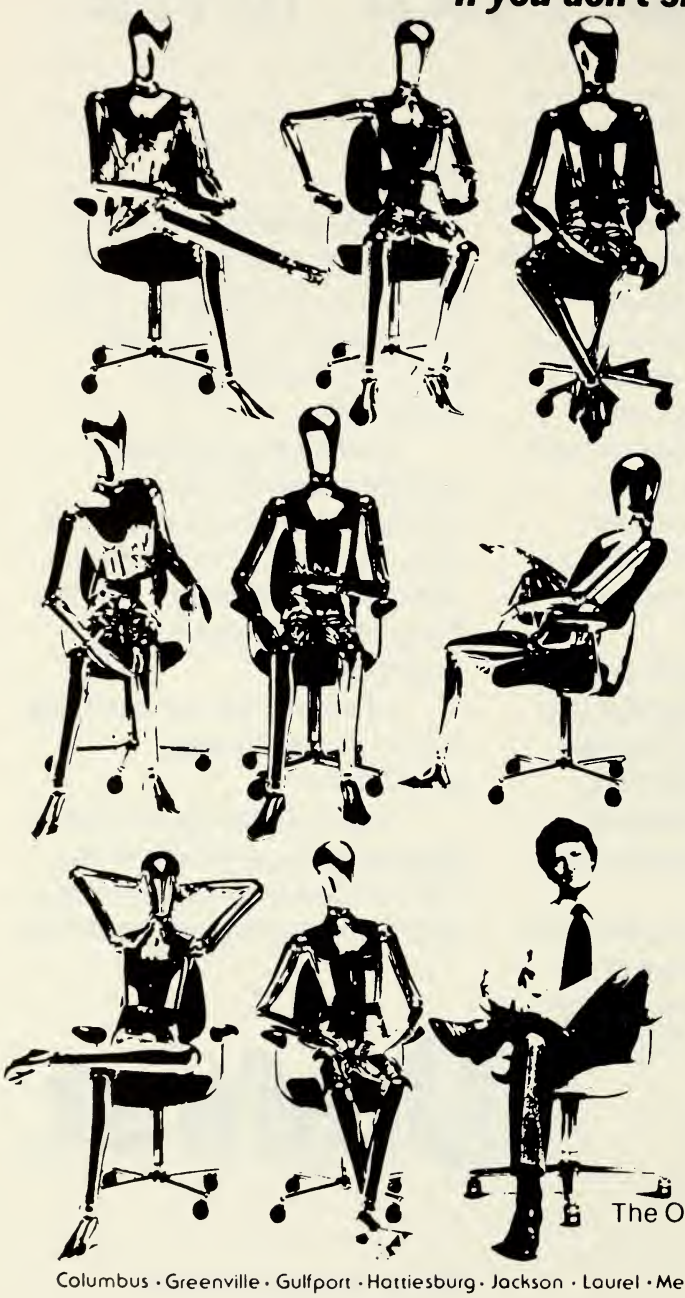

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